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H.R. 4263, THE SMALL BUSINESS AND MINORITY  
SMALL BUSINESS PROCUREMENT OPPORTUNI-  
TIES ACT OF 1994

Y 4. SM 1:103-84

H.R. 4263, The Small Business and M...

HEARING  
BEFORE THE  
COMMITTEE ON SMALL BUSINESS  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED THIRD CONGRESS  
SECOND SESSION

WASHINGTON, DC, MAY 24, 1994

Printed for the use of the Committee on Small Business

Serial No. 103-84



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# H.R. 4263, THE SMALL BUSINESS AND MINORITY SMALL BUSINESS PROCUREMENT OPPORTUNITIES ACT OF 1994

TUESDAY, MAY 24, 1994

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON SMALL BUSINESS,  
*Washington, DC.*

The committee met, pursuant to notice at 10:05 a.m., in room 2359-A, Rayburn House Office Building, Hon. John J. LaFalce (chairman of the committee) presiding.

Chairman LAFALCE. I apologize to the Members for my tardiness. It had to do with senior citizens from my district.

The purpose of today's hearing is to continue the committee's consideration of H.R. 4263, The Small Business and Minority Small Business Procurement Opportunities Act of 1994. H.R. 4263 makes two major changes in the Federal procurement law, one of which will greatly assist all small businesses, and the other of which is of major benefit to minority small business. The first would raise the threshold for contracts exclusively reserved for small business from the present \$25,000 to \$100,000. This should enable small businesses to obtain an additional \$1 to \$2 billion in Federal contracts a year.

The second change would create for the civilian agencies a Small Disadvantaged Business Program like the current section 1207 DOD Program. Section 15(g) of the Small Business Act currently establishes an overall governmental goal of 5 percent for SDB procurements and requires agencies to set their own goals in negotiation with SBA. DOD, however, has a statutory goal of 5 percent and has by statute two powerful procurement tools which it may use to help attain its goal: One, it may set aside procurement actions solely for SDB's and, two, in unrestricted competitions, where large companies and small companies often compete against each other, it may pay a price differential of up to 10 percent to SDB's which are technically and qualitatively capable of performing the requirement. H.R. 4263 would extend these tools to all the civilian agencies. In addition, each agency will be required to establish a minority procurement goal of at least 5 percent of agency dollars.

As you know, our committee in an effort to accommodate the administration's desire that the procurement reform legislation be expedited had originally scheduled a markup of H.R. 4362. In preparation for that markup, however, a large number of proposed amendments were received both from the small business procurement coalition and from individuals members of the committee.

A number of the amendments proposed useful adjustments and additions to H.R. 4263. These have now been incorporated in what I believe to be a consensus bipartisan committee mark in the nature of a substitute for H.R. 4263.

Among the changes which have been made are the following:

An amendment requested by Mr. Flake to require timely issuance of regulations.

An amendment requested by Mr. Fields to involve the Minority Business Development Agency at Commerce in the new Federal Acquisition Computer Network.

An amendment requested by Mr. Dickey to encourage procurement officials to experiment with innovative payment methods.

Amendments requested by the Small Business Procurement Coalition: First, to maintain current requirements regarding notice of contracting opportunities and minimum times for the preparation of offers until such procurements can be conducted through the system of electronic commerce announced by the President on October 26, 1993.

Second, to specify minimum response times available to small businesses to respond to electronic commerce announcements.

Third, to collect minimal data on contracts between \$10,000 and \$100,000 to determine how many opportunities which are reserved for small businesses are actually going to small businesses.

Fourth, to require fast payment procedures, 15 days rather than 30 days, on contracts under the \$100,000 threshold.

Fifth, to require contracting officials to provide at least an interim response to contract administration related inquiries from small businesses within 30 days.

Sixth, to allow low-bidder small businesses to appeal to SBA if they are refused the contract for failure to meet "market acceptance criteria"—for example, supposed inability to apply the volume of product desired by an agency.

In addition, the committee mark removes some of the provisions of the original H.R. 4263:

Section 6 of the bill, which referred to certain pilot programs, was removed because the Armed Services Committee has removed the pilot programs from H.R. 2238.

The set-asides for historically black colleges and universities and other minority institutions, the language of which was taken from DOD's current Section 1207 Program, was removed.

The language in section 5 which made specific reference to minority-owned media was also removed.

Some of the proposed amendments, however, were very substantive in nature and raised issues which may well be quite controversial.

Some of the issues that I have discussed earlier may also be controversial. It was decided, therefore, to postpone the markup and to have this hearing at which the administration could respond to these proposed changes.

The first of these issues is whether the overall governmental small business procurement goal should be increased to 25 percent from the present 20 percent.

A second issue is whether, in conjunction with the above, or on a separate basis, there should be established either a 5 percent set-



aside with preferential pricing, or a 5 percent overall governmental goal for small businesses owned by women, or alternatively whether we should give legislative sanction to the Executive Order which calls for agency-by-agency negotiation with respect to goals.

The constitutional and policy considerations are not the same for affirmative action efforts based on gender as they are for those based on race. Traditionally, Congress has enacted affirmative action programs to remedy racial injustices, particularly those inflicted upon African Americans. It is only very recently that goals based on gender have begun appearing in some statutes.

The amendments that may be proposed would set forth a Federal Government-wide gender based affirmative action set-aside or alternatively, goal of 5 percent of procurement expenditures for women-owned businesses. It is important that if the committee and the Congress are to adopt such a measure, it be based upon a thorough understanding of the constitutional and policy basis for such a program and a thorough consideration of all the ramifications.

Third, issue is whether small businesses owned by socially disadvantaged persons should be exempted from also having their owners be economically disadvantaged.

Fourth, is whether persons with severe disabilities should be deemed "socially disadvantaged" for the civilian 5 percent SDB Program.

Fifth, issue whether contracts below the small business purchase threshold, \$100,000, in cases where bids are equal, should be awarded by preference to local small businesses.

I will ask the Ranking Minority Member, Mrs. Meyers, if she would care to make an opening statement.

[Chairman LaFalce's statement may be found in the appendix.]

Mrs. MEYERS. I appreciate your calling this hearing to discuss the proposed amendments to H.R. 4263. I am particularly interested in the establishment of a goal for women-owned businesses. I believe that Congress has avoided its responsibility on this subject for far too long.

Currently, the Federal Government manages to award only 7/10 of 1 percent of its prime contracts, and only 1.8 percent of total contract dollars to women-owned businesses. This is appalling, especially when one considers that women comprise 51 percent of the population and 30 percent of its business owners.

In 1988 during committee hearings, Mr. Chairman, you stated that the less than 1 percent of contracts that women-owned businesses earn is far from adequate. That number has not improved and that was 5 years ago, Mr. Chairman.

At the same hearing it was noted that in 1975 the U.S. Civil Rights Commission reported that "women-owned businesses are hampered in the procurement process by the unavailability of information and biases built into the procurement system", and that there had been no improvement in the ensuing decades. Now, almost 12 decades later, there has been no improvement.

Evidence of sex-based discrimination is clear. This committee has held six hearings on this subject in the last 7 years. These hearings have documented the discrimination faced by women in all parts of the business world.

To add to that record I would like to introduce a summary of a report by Dr. Renee Blumstein, a recognized expert in the field of program evaluation and statistics. This synopsis outlines the overall discriminatory attitude presented to women in business. It also contains a bibliography of studies on sex-based information.

I am also looking forward to laying to rest the specter of constitutional problems with a goal for women-owned businesses. Since the decision in Metro Broadcasting, the Supreme Court has applied a more lenient standard to congressionally mandated, affirmative action programs for racial minorities or women. This standard is the result of deference to Congress' status as a coequal branch of government and our powers under the Commerce and Spending Clauses, along with our authority for remedial action. In fact, this reasoning has supported goals for women-owned businesses in several other pieces of legislation.

I would like to introduce two letters into the record. The first is from Kathleen Schwallie, a representative of the National Association of Women Business Owners expressing support for the goal.

The second letter is from Hon. Jere Glover, the Chief Counsel for Advocacy at the SBA. He outlines his support for the goal for women-owned businesses, an increase in the small business goal, the preservation of subcontracting plans, detailed reporting for small purchases, and definite linkage of any increase in the small purchase threshold to electronic commerce.

I look forward to hearing from the witnesses and I want to thank them for taking the time to appear before us.

[The information may be found in the appendix.]

Chairman LAFALCE. Thank you.

Are there any other Members who have opening statements?

Mr. Mfume.

Mr. MFUME. This Member would ask the indulgence of the chair. Regrettably, I am going to have to come and go throughout the course of the hearing. There are other meetings commencing at the same time at 10 o'clock. I think the Chair understands this Member's interest as I chair the Subcommittee on Minority Finance Enterprise, Finance and Urban Development.

Mr. MFUME. Thank you.

Chairman LAFALCE. Let me ask Mr. Bilbray as a subcommittee chairman to please proceed.

Mr. BILBRAY. Thank you, Mr. Chairman.

Mr. Chairman, as the committee continues its discussion of procurement reform legislation, I would like to commend the caution that you have shown with regard to H.R. 4263.

I am aware of many of the amendments that were offered by committee members to the committee markup that was scheduled 2 weeks ago. Although well intentioned, many of these proposals brought up a number of complex and complicated new questions that had yet to be discussed in the context of procurement reform. As the Chairman knows, we have had a series of hearings.

In postponing the markup, it gives a chance for us to bring in administration witnesses and I thank Steve Kelman for coming and giving us his opinion on many of these questions. But I would also like the Chairman to consider the fact that because of the complex nature and the fact that I have been contacted by representatives

of the small business community throughout the United States asking that they have an opportunity to have a hearing also to discuss these issues, I think it is very important that we get their feelings as well as the administration's and the SBA approval to this.

I would like to thank the chairman for having these hearings and moving forward on it because I think procurement reform is very necessary. We have had a number of hearings in the Small Business Subcommittee on Procurement and I commend you again for having these hearings today.

Chairman LAFALCE. Ms. Margolies-Mezvinsky.

Ms. MARGOLIES-MEZVINSKY. I want to thank you for holding these hearings this morning and I would like to join the Chairman in welcoming the witnesses. The issues before the committee, I feel, are very important.

I know that the chairman, Mrs. Meyers, and other members of the committee share my interest in the minority procurement process. The Chairman has been a great advocate for women's goals in the procurement process for many years.

I make these remarks brief this morning because I want to focus on what I consider to be a very simple message. I think that now is the time for procurement reform to include congressionally mandated contracting and subcontracting goals for women-owned businesses. As you know, Mr. Chairman, the Federal Government is the largest purchaser of goods and services in the United States, representing more than \$180 billion in purchases annually.

Even though women are playing an increasingly important role in the economy through the ownership of businesses, as Mrs. Meyers just said, they receive only 1 percent of all Government purchases of more than \$25,000. Leading organizations across the country representing women's business interests led by the National Women's Business Council are joining together to make sure that any procurement reform contain provisions to assist women-owned businesses to gain access to Federal Government procurement, a vital market for many businesses.

It is clear that after more than a decade of voluntary executive branch goal-setting we have learned that only where there have been legislated preferences have women-owned businesses made substantial gains. I commend the Chairman for his work in bringing before the committee a wonderful piece of legislation, the Small Business and Minority Small Business Procurement Opportunities Act of 1994, and I ask the Chairman and other members of the committee to join with me in accomplishing measurable goals for women-owned businesses. The time is now. This is the right time and it is the right place.

Thank you very much.

Chairman LAFALCE. I thank the gentlelady. Are there any other Members who have opening statements?

Mr. TUCKER. Mr. Chairman.

Chairman LAFALCE. Mr. Tucker.

Mr. TUCKER. I just want to join in thanking the Chairman for holding these hearings, obviously very important hearings connected with the reform of procurement, Federal procurement for Government contracts. In addition to promoting small businesses, through this reform legislation it is intended that the bill increase



minority small business participation in Federal procurement and Government contracts by creating a small disadvantaged business program.

What we anticipate, of course, Mr. Chairman, is that this program will work like the program currently being used by DOD to get historically disadvantaged businesses more involved with Government contracts. Serving on the subcommittee along with Chairman Mfume as it relates to minority business, I am extremely concerned about this current development.

Mr. Chairman, I want to once again say thank you for conducting these hearings on this very important piece of legislation, and I thank the witnesses for coming this morning. I look forward to submitting any formal questions for the record. I may have to run in and out this morning, but thank you for this opportunity.

Chairman LAFALCE. We will keep the record open so that if any Member has a statement they wish to make later, we will put it in as if it were an opening statement.

[Mr. Flake's statement may be found in the appendix.]

Chairman LAFALCE. We have three panelists, Steven Kelman, Administrator of the Office of Federal Procurement, OMB; Robert Neal, Associate Deputy Administrator for Government Contracting and Minority Enterprise Development, at the U.S. Small Business Administration; and Joan Parrott-Fonseca, Director of the Office of Small and Disadvantaged Business Utilization at GSA.

We had asked, too, for a representative from the Justice Department, but we were advised that they would be unable, within the time constraints given them, to develop an administration policy on some of the broad policy and constitutional questions which I had sent to them. But we will hopefully hear from them later.

Ms. Parrott-Fonseca, and gentlemen, initially I was hopeful that we could have just reported out a relatively simple bill, but then it became quite obvious that during the markup there would be so many amendments offered raising such profound questions that I would be doing a disservice to the body politic if we were to just have a vote on it without more careful deliberation of these difficult questions.

Then, too, upon examination of section 1207, and this committee never had jurisdiction over section 1207, I saw some provisions within it such as provisions which give historically black colleges and universities and minority institutions a piece of the 5 percent—it is not just a goal either, it is a set-aside with preferential pricing and I wondered two questions, first, would our committee have jurisdiction over colleges and universities of any kind; and second, what are the constitutional justifications for the set-aside?

I also had some qualms, too, about singling out one specific entity, the minority media. I know the SBA has a policy, which I think is sound, that government ought not give loan guarantees to media—again on policy and constitutional grounds. So I wondered should they be specifically included within an expansion of the 1207 Program. They are in section 1207 right now.

I would be interested in how you deal with those two questions under section 1207 as it has been applied.

Then the issue of how to treat women-owned businesses is a complex one. I have always thought that maybe the best thing to do

would be to give legislative sanction to the existing executive order and try to beef up those goals if possible. Some others were going to offer either across-the-board goals or agency-by-agency goals, 5 percent for each agency. The question is— would it be the same as section 1207, because 1207 is not simply a goal, it also contains the ability to effectuate that goal by set-asides and a 10 percent price differential.

So, are we talking about doing the same thing for women as we are for blacks? It depends what amendment is offered.

So, because of all these questions, I thought it best to have the administration testify, and I am hoping that we can subsequent to that sit down collegially before markup and try to get some type of bipartisan accord as to how to proceed.

If there is need for further hearings, as suggested by Mr. Bilbray, we will certainly consider that option, also.

With those thoughts, please continue.

### **TESTIMONY OF STEVEN KELMAN, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OMB**

Mr. KELMAN. Thank you, Mr. Chairman and Congresswoman Meyers. Thank you for the opportunity to be here today. I would like to have my full statement entered into the record.

I want to start off by restating for the record what I stated in my testimony before this committee on April 28 that—

Chairman LAFALCE. I might say that one of the reasons we didn't just accept the Armed Services Committee's "discussion draft" is because it was going to eliminate the provision requiring subcontracting plans, and it was our opposition to the deletion of the subcontracting provision which caused us to introduce H.R. 463 and then all the other questions came about after that.

Mr. KELMAN. That is why you didn't invite them today. Whatever. I just—

Chairman LAFALCE. We are going to keep the subcontracting provisions, be sure of that.

Mr. KELMAN. I wanted to start off by restating for the record what I stated in my testimony before this committee on April 28 that the administration strongly supports the purposes of H.R. 4263 and are working and will continue to work very hard to increase the participation of small business SDB's and women-owned business in Federal procurement. As you requested, I am going to discuss the administration's views on several of the proposed amendments. With regard to constitutional issues, we will be deferring, however, to the Department of Justice, which will be preparing a statement for the record at an appropriate point.

Let me discuss first the amendment to increase the overall small business procurement goal from 20 to 25 percent. We are pleased to see that the small business share of Federal contracts has been increasing over the past few years and we exceeded the 20 percent goal for fiscal year 1993. The administration has not had sufficient time to develop a position on the appropriateness of an increase in the goal for small business awards. We understand the desire of Members to continue pressing for improvements in awards to small businesses; and certainly independent of what Congress decides in

this area, we will continue to work as we are directed to do by statute with SBA on these goals.

I think that we in OFPP have a history of good cooperation with SBA. I think it is no surprise—or I will be stating what everybody else states—to say that I think the small business community is very lucky to have advocates of the quality of Administrator Bowles and Deputy Administrator Pulley working on these issues and working with us. I would like to take this opportunity to express my gratitude that we are going to be able to work with Bob Neal, a former long-time colleague of ours, now promoted to his new position at SBA. We look forward to continuing to work with him on these issues.

You asked for the administration's position on establishment either of a 5 percent set-aside with preferential pricing or a 5 percent goal for women-owned small businesses.

There have been improvements over the last 3 fiscal years in contracting with women-owned small businesses. Over 10,000 new women-owned small businesses are participating in Government contracting and awards have increased from \$2.8 to \$3.2 billion. We share Congresswoman Meyers concern that progress has not been fast enough in this area and we are not doing as well as we should be. While the administration strongly supports contracting with women-owned small businesses, we have not, however, had sufficient time to establish a position from the administration on the appropriateness of a statutory goal for women-owned small businesses.

With regard to another question raised in your letter about whether people with severe disabilities should be deemed socially disadvantaged, the administration has not previously considered such a classification for the severely disabled, and we recommend that this matter be studied further.

We do have concerns about the proposed amendment to establish a separate procurement set-aside goal for historically black colleges and universities. We certainly recognize and appreciate the important role that these institutions play in higher education but we do not support a separate goal for HBCU's. We do believe that the expansion that you referred to of the 1207 Program to civilian sessions, which includes the authority for HBCU set-asides, will achieve the goals of the Congress and the administration.

On the issue of minority owned media sources, we are going to defer to the SBA for—on the question of whether there is a need for a special category for these firms.

On the proposed amendment regarding a local preference, where an offer from a local small business concern is at least as advantageous to the Government as any other bid or proposal received, we are opposed to this provision because it would give preference to an offeror from one geographic part of the United States over offerors from other geographic parts of the United States.

This would contradict the goal of the electronic commerce program which is to give national visibility of purchase opportunities to small businesses.

In addition to your letter, we have been provided a copy of the revised drafts of 4263. We continue to have the concerns I raised



in my prior testimony about the regulatory prices contained in Section 5 of the bill.

In addition, as you suggested in your opening statement, Mr. Chairman, we do have major concerns about a number of provisions that have been incorporated into the latest draft and would like to discuss them, if we could.

Chairman LAFALCE. You said you continue to have concerns raised in your prior testimony about the regulatory provisions contained—

Mr. KELMAN. Yes. That is to say provisions that would have the Small Business Administration develop regulations under the 1207 Program rather than using the normal regulatory process including consultations with the SBA. But there is an existing regulatory process for these things that involves widespread consultation with the public and within the Government.

We are strongly opposed to provisions of draft Section 7 that would amend Section 8 of the Small Business Act regarding procurement notice.

There were three provisions there that we are concerned about. Number one, the provision to continue to require a 30-day waiting period after the initial 15-day publication or notice requirement before procurements under the new simplified acquisition threshold could be awarded unless they are conducted through EC. Let me explain a bit more of what is going on here. We currently require for procurements over \$25,000 for there to be a 15-day notice in the Commerce Business Daily to allow businesses to learn about these procurements, and then we require a 30-day wait for businesses to be able to present their bids to the Government.

The administration is willing to support prior to electronic commerce the continuation of the 15-day notice period in the CBD to allow small businesses notice of these procurements. We don't believe, if we are talking about simplifying these procedures for these \$25,000 to \$100,000 procurements, we don't believe it is necessary to specify in statute that we continue to require a 30-day wait period for receiving the bids.

The administration is willing to accept and does endorse the continuation of the 15-day notice provisions for small business in the CBD prior to electronic commerce. However, we believe it is contrary to the idea of simplification and of simplifying these purchases to require us to wait another 30 days to receive bids on these proposals.

Second, we oppose the provision—we earlier testified that we have great concern about the provision that requires agencies for contracts—small solicitations between \$10,000 and \$25,000 to wait for 10 days.

Third, that was in the bill before—we have already testified we have serious problems with that. The new provision also requires establishing minimum solicitation periods for various kinds of procurements even when being processed through electronic commerce. We believe that that kind of specific requirement and statute is unnecessarily restrictive. It doesn't take into account changes in computer technology and speed, et cetera, that will come from electronic commerce.

We are also very concerned about the provision in Section 8 of the bill which imposes a 5-year requirement for agencies to continue to have detailed statistical reporting for procurements between \$10,000 and \$100,000. I think there may be some misunderstanding about current reporting requirements and, therefore, I brought the forms that we currently use with me and will submit them for the record.

Mr. Chairman, you said in your opening statement you want to make sure that we contract between \$25,000 and a \$100,000, are we buying from small businesses, are we buying from SDB's. I would like to assure you we are already doing that. This is the form that we already use for purchases under \$25,000 and the form that if this provision were not adopted would continue to be used for purchases up to \$100,000 under the simplified acquisition threshold. This form already has statements about the volume of purchase to small business concerns, to large business concerns, small purchase set-asides, labor surplus set-asides, 8(a) awards, small disadvantaged business awards, women-owned small business awards, sheltered workshop awards. The DOD version also includes awards for historically black colleges and universities. We would be happy to add that Governmentwide. We already are collecting this information.

The form that Section 8 would require is a much more burdensome form. It has to be filled out separately for every individual procurement action rather than being able to be summarized for procurement actions as a whole so you can see what dollar volume goes to small businesses. This form has to be submitted for every single procurement action. It contains large numbers of questions having nothing to do at all with the concerns that you expressed in your statement.

There are three questions about applicability of the procurement, the Competition and Contracting Act which is not applicable under \$100,000 under the simplified purchase threshold. They would still have to fill out for each procurement that it is not applicable. There are questions on the date the solicitation is issued, was a final audit required, was the contract to an international organization, was it an advisory and assistance award, was there a Government-furnished property, was there a subcontracting plan which is not applicable under \$5,000 anyway but they would have to do for every procurement. They would have to fill in "no" under that box. The PIN number, the SIC code of each contractor, the name of the contractor. This is a far more burdensome form and to say that we are trying to introduce a simplified acquisition threshold up to \$100,000 and require people to fill out this form for every single procurement when we are already getting all the small business information and the small and disadvantaged business information, women-owned business information on the existing form, is just completely contrary to the idea of a simplified acquisition threshold.

We would also note that the provision in Section 8 actually increases the burdens of the current law. Currently we are required to fill out this form for procurements over \$25,000. That is because they are not subject to the simplified acquisition threshold.



We are trying to raise the simplified acquisition threshold to \$100,000 and get rid of this burdensome form. The provision of Section 8 not only continues this burden under the simplified acquisition threshold, but actually lowers it down from \$25,000 to \$10,000. So there are hundreds of thousands of procurements that are currently not subject to this burdensome form that would become subject if this provision were put into law. This is totally contrary to procurement simplification and does not add anything on to what we already are learning about opportunities for small business.

We are also very concerned about the impact of the requirement—

Chairman LAFALCE. You would like us to do something about Section 8?

Mr. KELMAN. Yes—the fast pay provisions. This requirement places an unrealistic burden on the Government procurement payment systems. It is inconsistent with commercial practice which typically sets forth a 30-day payment period rather than a 15-day payment period and it exposes the Government to potential fraudulent activity by contractors. We cannot support these provisions.

We could support the provisions in the original version of 4263 that proposed use of fast pay procedures “wherever circumstances permit” under the simplified acquisition threshold.

To conclude this section I would like to say I just want to use this opportunity to point out the administration’s severe concern that we are using this phrase, we are saying we are raising the simplified acquisition threshold to \$100,000 and we are one after one after one eliminating all the simplifications that exist between \$25,000 and \$100,000 until we are soon going to get to a situation where this is going to be fraudulent advertising.

We call it an increased simplified acquisition threshold, but all the simplification is gone and it is going to be a simplification in name only. We are going to see a situation, I predict, where agencies are going to opt out of even wanting to participate in the simplified acquisition threshold and opt out of the increase in the small business reserve because they don’t believe they are getting anything for it.

Chairman LAFALCE. Mr. Kelman, I want to assure you that this is a working process and we have the same goals as the administration and we will work closely with you. We are trying to make sure that the concerns that have been expressed by small businesses and minority small businesses do receive attention. We have caught your attention.

Mr. KELMAN. Yes.

The last thing I want to talk about, the provision in Section 10 on expanding the authority of SBA under the Certificate of Competency Program to provide for SBA review of any determination that products offered by small businesses do not meet a market acceptance criteria—let me explain what is going on in this market acceptance criterion provision.

This is the ashtray or type of the ashtray that Vice President Gore took on the David Letterman Show last fall to illustrate the absurdity of lengthy Government specifications that end up with the Government buying Government-unique products rather than

commercial products. The reason we have these lengthy specifications is to prevent the Government from being cheated by some loophole when the Government opens up bidding to products that have never achieved any acceptance in the commercial marketplace. The commercial market acceptance test that has been introduced into the procurement reform legislation is the way that we are proposing to deal with the absurdly lengthy specifications that lead to the problem that the Vice President highlighted on national television last fall.

Basically what we are saying is that the Government should be allowed to shorten the specification, make it much more broad and simple, and then say that before you can sell this ashtray to the Government you have to show that you have succeeded in selling your ashtray to some real live consumers in the commercial marketplace. If we do that we can say we don't need such complicated specs because if you have shown you can successfully sell your product in the commercial marketplace, we can take that as a proxy for saying this product must be OK. We can have sort of a comfort level with it.

This amendment constitutes a major expansion of the COC Program which traditionally has involved decisions about contractor responsibility, is a contractor capable of meeting the Government requirement, and goes into instead issues of what the Government requirements are at all. It would be a major—it would be directly contrary to the recommendations of the Vice President's National Performance Review for increased purchase of commercial items and is therefore unacceptable to the administration.

I am sorry, I may have gotten a little bit emotional in my testimony. You have gotten our attention and I apologize for excessive emotion. Us New Yorkers sometimes get that way.

I appreciate the opportunity to appear today and look forward to working with the committee.

[Mr. Kelman's statement may be found in the appendix.]

Chairman LAFALCE. You can never criticize anyone for being too emotional, at least from my perspective.

Our next witness is from the SBA, Mr. Robert Neal.

**TESTIMONY OF ROBERT L. NEAL, JR., ASSOCIATE DEPUTY ADMINISTRATOR FOR GOVERNMENT CONTRACTING AND MINORITY ENTERPRISE DEVELOPMENT, U.S. SMALL BUSINESS ADMINISTRATION**

Mr. NEAL. Mr. Chairman and members of the committee, I want to thank you for giving us this opportunity to come before you today and provide our comments on H.R. 4263, a bill to promote the participation of small disadvantaged businesses in Federal procurement. Erskine Bowles thanks the chairman and the committee because we feel that this is an issue very near and dear to our hearts and that it will go a long way toward helping small disadvantaged businesses participate more in Federal contracting.

The Administrator asked me to appear to represent the agency. SBA believes that there is a need for Federal procurement reform and believes that the results could be good for small businesses, for the taxpayers and for the Government. Small business is a key stakeholder in procurement reform.

Therefore, it is important to keep in mind the concerns of small business. I will provide SBA's comments on the seven specific issues you raised in your letter of invitation, as well as comments on other provisions in the proposed amendment in the nature of a substitute to H.R. 4263.

You asked for SBA views regarding several specific constitutional issues. The SBA does not speak for the administration regarding questions of constitutional interpretation and we believe that these questions are better suited for the Department of Justice and they will provide them to you at a later date.

The first question is a proposed increase to the overall small business procurement goal from 20 to 25 percent. Since the procurement preference goaling process was first incorporated into the Small Business Act and SBA began negotiating with the agencies, the annual Governmentwide goal for small businesses has moved from 19.8 percent in fiscal year 1988 to 22.9 percent in fiscal year 1994. More importantly, the achievement reports each year reflects similar increases, from 20.2 percent for fiscal year 1988 to 23.5 percent for fiscal year 1993, the latest complete year that we have.

We are pleased to see this increase in the small business share and hope that all Federal agencies continue to appreciate the importance of small businesses to the economy.

On the next issue as to whether a 5 percent set-aside with preferential pricing or a 5 percent goal for women-owned businesses should be established, SBA is deeply interested in expanding opportunities for women-owned business in Government contracting and elsewhere. In fact, we have already established the practice of annual goals for participation in procurement by women-owned businesses both in prime and subcontracting. We are currently exploring ways to increase the participation of women-owned businesses in the Federal procurement arena. This effort includes research to identify industries where significant concentration of women-owned businesses exists.

With respect to the third issue regarding whether small businesses owned by socially disadvantaged persons should be exempted from having their owners be economically disadvantaged, to require social and economic disadvantaged limits the growth potential for small disadvantaged businesses as well as severely restricts access to capital. For example, companies graduating from the 8(a) Program that no longer qualify for economically disadvantaged status would be unable to benefit from the SDB preference programs that you are proposing to expand Governmentwide.

You also asked whether persons with severe disabilities should be deemed "socially disadvantaged" for the civilian agency 5 percent SDB Program. It is important to note that the "severely handicapped" can and do qualify as socially and economically disadvantaged on an individual basis under existing regulations. This issue wants further study since inclusion of the severely disabled under the SDB definition raises questions regarding the implementation that would need to be addressed.

For example, there is no clear definition of "severely disabled" in the proposed legislation. Also, procedures will be necessary to address challenges to an assertion of an owner of a firm being severely disabled. In addition, the Federal Procurement Data System



does not currently collect data on contracts awarded to severely disabled individuals. While the issue of data collection can be resolved administratively, we note that the stress in procurement reform is on reducing regulations and paperwork. As the assistance programs multiply, the burdens of reporting and of administering the processes for assuring that only the qualified receive the benefit are also multiplied. This could eventually cancel the benefits of simplification elsewhere in the system.

The fifth issue is whether the Small Business Act would include a goal for historically black colleges and other minority colleges. A proposed amendment would establish a 5 percent Governmentwide goal of total value of all prime and subcontract awards made to institutions of higher education for participation by historically black colleges and universities and minority institutions.

Information regarding contract awards to institutions of higher learning is not available, so monitoring performance against this goal would be difficult and would impose increased administrative burdens on the system. It is also significant that much of the Federal funding of educational and other nonprofit organizations is through grants and cooperative agreements. We have been unable to ascertain the proportion of such funding which is obtained by educational institutions. Even less clear is whether the targeted organizations are participating at a significant level. We believe that the question of goaling and participation by these institutions should be part of a greater effort resulting from a more complete examination of the entire spectrum of Government funding and not just limited to contracts. This will provide a more accurate picture and permit reasoned decisions on the goals and whether they should be established.

The sixth issue is whether minority owned media should be singled out for special attention in the 5 percent SDB Program goal. Minority owned media firms are included in the SDB goal as are all firms that qualify for the SDB preference. SBA believes, therefore, that it does not serve any purpose to specifically mention this one industry group.

With respect to the final issue about which you inquired in which you are looking at contracts below \$100,000 and whether they should be awarded by giving preference to local small businesses in cases where the bids are equal, SBA does not support this amendment. This proposal amounts to a preference for a local offerer when a local offerer and another offerer from outside the area are tied for the award. This tie breaker preference would add significant complexity to the Federal procurement process at a time when the administration is seeking to streamline the procurement process.

Additional provisions would be necessary in the procurement regulations and Government solicitations to adjust for this new preference. It is unlikely that the number of "tie offers" would be large enough to justify this additional paperwork and burdens.

Mr. Chairman, procurement reform is a complex issue that must achieve a careful balance between two of the goals that the President has outlined for his administration: Streamlining and simplifying the Federal Government, and supporting small, small disadvantaged, and women-owned businesses.

This concludes my testimony and we look forward to working with the committee and with Steve in trying to reach an agreement that the small business community will benefit from.

Thank you.

Chairman LAFALCE. Thank you very much Mr. Neal.

Our next witness is Ms. Parrott-Fonseca.

**TESTIMONY OF JOAN PARROTT-FONSECA, DIRECTOR, OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION, GENERAL SERVICES ADMINISTRATION**

Ms. PARROTT-FONSECA. I, too, am a native New Yorker so I am going to try not to be emotional and to be brief.

Mr. Chairman and members of the committee, my name is Joan Parrott-Fonseca. I am the director of the Office of Small and Disadvantaged Business Utilization of the General Services Administration. I have been in the position for only a few months now, but I bring to the Federal Government extensive experience in small and disadvantaged business utilization and development at the State and local level in the Governments of New York and the District of Columbia.

Administrator Roger Johnson asked that I testify on behalf of the GSA and I am pleased to appear before you to provide the agency's views on H.R. 4263, the Small Business and Minority Business Procurement Opportunities Act of 1994.

I respectfully submit the full testimony for your review.

Although we defer to FPP, Justice and SBA on many of the issues addressed in this bill, I would like to take this opportunity to talk about a few GSA initiatives in this area.

GSA is a strong proponent of small and disadvantaged and women businesses participating in Federal contracting. Such businesses generate a substantial number of jobs for the American people and we endorse all efforts to strengthen small businesses, especially disadvantaged and women-owned businesses.

Although GSA has achieved a participation rate well in excess of 30 percent by small businesses, our record of less than 2 percent annual participation of women-owned businesses is clearly unsatisfactory. We are committed to increasing the participation of women-owned businesses and have taken many steps to rectify past deficiencies in our program implementation. In the last few months, we have established a training and compliance component which has oversight of GSA subcontracting and compliance programs.

This division has begun to work closely with the contract officers to establish appropriate goals for disadvantaged and women-owned businesses. This division will develop and coordinate training modules for GSA procurement personnel and external training targeted toward small, disadvantaged and women-owned businesses. GSA has increased its outreach and advocacy programs significantly. Outreach to individual women-owned businesses and organizations to provide technical assistance and information is ongoing and a women-owned business demonstration project is in the planning stages.

The industry liaison component of our office has been dramatically increased and the office is exploring mentoring programs and

has established women-owned business as a priority. A specific goal is to establish a GSA-wide directory of women and disadvantaged firms to be used by GSA procurement personnel in locating sources.

Finally, we will continue to work proactively to create innovative and aggressive programs which increase participation of women and disadvantaged businesses in Federal contracting.

Thank you.

[Ms. Parrott-Fonseca's statement may be found in the appendix.]

Chairman LAFALCE. Thank you very much. I will defer my questioning until the end.

Mrs. Meyers.

Mrs. MEYERS. Thank you Mr. Chairman.

Dr. Kelman, regarding the market acceptance criteria, will the administration accept a revision on the use of quantity or volume as a criteria? I think the small business fear is that the criteria, if you have you already sold some of these, that the criteria will require sales figures far in excess of their ability.

So, do you foresee this as a modest requirement for having made a sale?

Mr. KELMAN. That is a fair question, a good question. I think that the expectation would be that the market acceptance criteria would be established on a case-by-case basis in the individual solicitation by the agencies. I do understand the concern you are expressing that one might imagine a company that let's say almost all its business is in the commercial marketplace, and it does sell to the commercial marketplace, but it is a small business and the dollar volume of its sales are small.

I think the purpose of the commercial market acceptance test is to see that a firm has tried and succeeded to offer its products on the commercial marketplace. I would certainly be open to—in consultation with technical experts in GSA, which is involved in commercial market acceptance tests, Defense Logistics Agency, et cetera—to think about how we might structure some language, either statutory or regulatory, that would keep the intention of saying that we just want to see that companies have sought and received acceptance of their products in the commercial marketplace without unfairly excluding a small business that is in the commercial marketplace, but simply has a small total amount of sales.

I understand the purpose behind your question and I think that some of the technical people would be happy to work with staff or whatever to see if something could be worked out that would accommodate that concern.

Mrs. MEYERS. A question for Mr. Neal. I would like, without pinning you down too much, because of course we don't know the specific form of some of these amendments, but does the SBA support raising the small business loan from 20 to 25 percent, and does the SBA support the establishment of a goal for women-owned businesses?

Please note that I am just referring to a 5 percent goal without set-asides, without bid levels, just a Governmentwide 5 percent goal.

Mr. NEAL. Mrs. Meyers, the Small Business Administration has only been collecting data on women-owned businesses for a few years. During this time we have seen there has been a steady



growth in participation of women-owned businesses, but it has not been at the level that we feel overall should take place considering the numbers out there. We are working with each Federal agency, when we develop our goals each year, to set challenging goals.

Currently we are examining initiatives within the SBA that will be used to improve the access to capital and to Federal contracts for women-owned businesses. For example, in our finance programs we have seen from our efforts that the women-owned business share has increased significantly, particularly in the microloans area where over 30 percent of microloans go directly to women-owned businesses, which is a much closer approximation of what they show up in demographics.

Ms. WATERS. Why don't you answer whether or not you support 5 percent so we can get out of here.

Mrs. MEYERS. I also would like to comment, Mr. Neal, that both you and Dr. Kelman made the comment that the amount for women-owned businesses has increased, and looking at a chart that shows women-owned small business share of Federal prime contracts, that the dollar amount actually went down from 1992 to 1993. So the percentage stayed the same because there was a slight incline in the overall total of dollars but the amount for women actually went down and I would like to know what you are looking at that I am not seeing.

Mr. NEAL. This is the data reported to us by the agencies to us directly in support of the goal process. We realize that there is a discrepancy between reported data and the data that is included in the Federal procurement data system, but that is attributable to the time difference in what is submitted to FPDS and what is submitted directly to us. The data that I have available shows an increase from fiscal year 1992 to 1993.

Mrs. MEYERS. The percentage did not increase. I would like to talk with you about this after the meeting or have my staff discuss this with you on the telephone because I am confused.

Mr. NEAL. We would be happy to discuss this with you.

Mrs. MEYERS. Do you support the 5 percent set-aside rule?

Mr. NEAL. At this time the administration has not developed a position with respect to the 5 percent goal.

Mrs. MEYERS. We hope it is positive.

Chairman LAFALCE. Mr. Hilliard.

Mr. HILLIARD. Thank you, Mr. Chairman. Let me ask a general question before I get started. Have the three of you discussed your presentations this morning?

Mr. KELMAN. With each other? Yes, we have.

Mr. HILLIARD. It seems that way because all of you had flowery words, no substance, and you have not answered the Chairman's question.

Let me give you an example of what I am talking about. If you turn on page 3—

Mr. KELMAN. Of whose testimony?

Mr. HILLIARD. Dr. Kelman. You mentioned in the first full paragraph on page 3, small business owned by women, in the middle you say the administration, it has not had sufficient time to establish a position on the appropriateness of a statutory goal for women-owned small businesses. Then on the same page, the second

full paragraph dealing with socially disadvantaged individuals, you said the administration has not previously considered such a classification. In the first instance, I want to know how much time do you need in order to set a goal where women are concerned, or do you intend on setting one?

Mr. KELMAN. Sir, what we refer to in the testimony is that we only received information about this hearing a few days ago.

Mr. HILLIARD. I understand, but how long have you been in office?

Mr. KELMAN. How long have I personally been in office?

Mr. HILLIARD. Yes.

Mr. KELMAN. I was confirmed by the Senate in mid-November.

Mr. HILLIARD. How long will it take you to set a goal? Have you discussed it, you and the administration?

Mr. KELMAN. We have had a few internal discussions. The issue was raised by the committee to us only a few days ago.

Mr. HILLIARD. One of the reasons Congress has to act is that we have do-nothing bureaucrats. You haven't set policies. You are still rumbling, as I see things, from the past administration and I am not satisfied.

Let's go on to page 4 talking about historical black colleges and universities, and there you said, we have concerns about the proposed amendments. You give no real alternatives. You don't even discuss alternatives. You don't even set out whether there are any possibilities. We are talking about a group that historically has been left out and that is the reason we want to include them on a set-aside level.

On the same page 4 in the second paragraph, we are talking about minority-owned media and this is where I see the cooperation between you and SBA. You say you are going to defer to SBA on the need for special recognition of these firms. Well, Mr. Neal comes over and says on page 5 of his testimony that—second paragraph—SBA believes that it does not serve any purpose to specifically mention this one industrial group.

Well, the only growth area in this country now and probably for the next 25 to 50 years is in the communication industry. I mean, we are putting all kinds of effort and money into the superhighway project, and traditionally minorities have been left out of the communication industry. In fact, SBA has a prohibition against financing broadcast properties. So minorities and women have not had an opportunity to get into this area.

Now Mr. Neal comes here and tells us he doesn't see any reason why they need to be singled out. The fastest growth area in our economy, 25 and 30 percent of the total GNP in the next 30 years and you have not had sufficient representation, no financing available, and you don't want to single them out?

Well, let me ask you this, all three of you. What is the administration's policy toward inclusion in this great society that you flowery called diversity?

Mr. NEAL. On behalf of Administrator Bowles and my understanding of what we are trying to do, we are working very hard toward including as many people as we can in the process.



Mr. HILLIARD. How? You have no goals. You oppose those we are trying to set. You come with no alternatives. How do you plan on doing it or when?

Mr. NEAL. We have made substantial efforts in the financing area to make it more accessible to minorities with business enterprises. We have looked at the administrative burden that we place on entities and developed a form for our loan program. Where before you would submit an application of this size, now you can submit a 1-page application.

Mr. HILLIARD. Simplicity doesn't mean anything if it doesn't mean inclusion.

Mr. NEAL. The purpose of simplifying the form is to make it easier for individuals to come in——

Mr. HILLIARD. That means nothing in America if there are no goals, no set-aside. They deny you if it is a 1-page or 50-page form you have to fill out.

Mr. NEAL. What the agency has done with the district directors is we have set up specific performance standards——

Mr. HILLIARD. Would you mind sharing those standards with us? Otherwise, if you don't, we want to know what you have in mind or what you plan on achieving.

Mr. NEAL. I am quite sure the Administrator would be more than happy to share those standards with you.

Mr. HILLIARD. Do you have them now?

Mr. NEAL. I came to talk about Government contracting. Finance is another part of the SBA house, but I am aware of what is going on there and the Administrator is working diligently to increase access to capital for minorities.

Mr. HILLIARD. Well, how long to we have to wait before you come out with something?

Mr. NEAL. We are pilot testing the program now with the loan forms. We developed the Microloan Program. We have taken the steps of developing a working capital program that will make it easier for small minority firms to get over those difficult periods when they may not have the cash flow to sustain them.

Mr. HILLIARD. Thank you, Mr. Chairman, but I have no faith in this administration.

Chairman LAFALCE. Ms. Margolies-Mezvinsky.

Ms. MARGOLIES-MEZVINSKY. Thank you, Mr. Chairman.

Administrator Bowles told representatives of the National Association of Women Business Owners, their legislative committee, that—this was at a meeting last week—that he supports a 5 percent goal for women-owned businesses. Could you just kind of clarify that for me? Could you essentially answer the question, if that is the truth, and I would suspect it is, why in this kind of presentation we didn't get the sense that at least we are singing from the same hymnal?

Mr. NEAL. Well, in the discussion of the testimony there are a number of concerns that had to be aired out and in discussing this with other administration officials, at the time we realized that there was no consensus of opinion as to the direction that we will be going in. That is why we are presenting the position that we have today. There are numerous parties that we are discussing it with in senior levels to try to figure out the direction and the appa-

ratus that we will use to try to achieve increased inclusion of women-owned businesses.

Ms. MARGOLIES-MEZVINSKY. One would assume that one of the people with whom you are speaking is Mr. Bowles.

Mr. NEAL. I spoke to him directly several times about this issue. What I am trying to get across is that while I am taking my lead from Erskine, there are other significant players in development of the policy that we have to consult with before we come out with the administration position.

Ms. MARGOLIES-MEZVINSKY. Could you give us some kind of a timeframe when a decision will be made?

Mr. KELMAN. I am hesitant to give an exact timeframe right now. I hear the wish of the committee that we try to do it promptly and that we come back to you promptly, and we shall do so.

If I could say a word to Congressman Hilliard.

Sir, I appreciate your worries about do-nothing bureaucrats or whatever, although if you met some of the folks in my office who are working weekends and evenings for procurement reform, it is not the bureaucrats. I want to say specifically there are specific goals both for small business and SDBs that are well-established and that the administration continues to work on.

Every year the Small Business Administration negotiates with the agencies and departments and negotiates very hard with our cooperation with the Office of Management and Budget to set aggressive goals for small business contracting. That has led to as I pointed out and Mr. Neal pointed out steady increases over the last 5 years in the percentage of contracting that goes to small business.

We are also meeting the SDB goals that are set up each year. So it is not as if folks are sitting and not doing anything.

On historically black colleges and universities, you asked are there alternatives to the 5 percent goal. As we indicated, there is an alternative in the language that the administration and that this committee supports, which is that DOD already has the authority to do set-asides for HBCU's.

That authority is intended to be expanded Governmentwide to civilian agencies by this legislation. The administration supports that expansion, as does your committee.

Chairman LAFALCE. It was my intention, since I wasn't sure of the arrival time of each Member, just to go right down the line.

Ms. MARGOLIES-MEZVINSKY. I find it difficult to believe that this administration, especially Vice President Gore, wouldn't want to take all possible steps to increase contract awards to women during his watch. Can you tell us what specific plans you have to increase the contract awards to women business owners?

Ms. PARROTT-FONSECA. I would like to address that. My answer is somewhat different because I think that I would be less than candid if I said that I thought GSA had been doing a good job in terms of inclusion of minority and women, although traditionally GSA has made its small business percentages, very, very low percentages in terms of women, less than 2 percent and minorities around 5 percent. So coming into this job and working a GSA has been far different for me because it is about coming from the Dark Ages to the 1990's.

Thus far the administration at GSA has been providing leadership and resources, which is indicative of support. We have expanded the office to include a compliance and training component which did not exist. Right now we have submitted a new sub-contracting proposal and we are striving for administrative goals for women and minorities that are much higher than in the past.

We also have to provide internal training because of an institutional past that we must now overcome and that process has begun. Compliance and training is working with contracting officers and other procurement professionals. In addition, we have an executive leadership program in which my staff and myself have been going around to the regional administrators and getting commitments which vary from region to region based on the makeup of minorities and women.

We also have been discussing with prime contractors and big business and medium-sized business a mentor/protegee program which will have a specific focus with women. We have been talking to individual women business owners, minority businesses and traveling extensively to get the appropriate feedback to change or to decrease the barriers that we find in our program.

Ms. MARGOLIES-MEZVINSKY. I would like Mr. Kelman to answer that, too, if you could do that quickly.

Mr. KELMAN. I think that both GSA and the SBA have already in their testimony referred to initiatives that are underway and that are happening to work on this, to work on this problem. My understanding is that many other executive branch agencies that aren't here today have also in the recent past begun such programs.

We are—we believe that our success in this area is not what it should be yet. We agree with that. We hear the concern the committee is expressing.

Chairman LAFALCE. Mrs. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

I don't think I have any questions. It is clear to me what is happening and I think there may be a consensus by those who understand procurement about what needs to be done. I offered AB1936 in the State of California, a strong affirmative action law for women and minorities.

The first thing that you need is you need to set goals. If you are not willing to recommend and set goals, you will never have leadership from the top. That is very clear. This business about being scared to set goals because somebody is going to think it is set-aside and people are afraid of the affirmative action word needs to be clarified.

We are not talking about set-asides. If I had my way, I would, but I know that we have come to a point in time where the consensus is, let's do goals. It is not politically dangerous to set goals, so we need to get rid of the fear that somehow setting goals is going to cause a problem and set some clear goals. Once you set goals, then you have something to work with.

Your mentorship programs are fine, but that assumes people don't know how to do business. I don't think that is the real problem. That could be of help, but the fact of the matter is there are people lined up ready to do business that can't get in the door. Peo-



ple need to get in the door. Then we can talk about partnership, mentorship, "train you and teach you" kind of stuff, but as I see it, that is a smoke screen for not wanting to set goals and actively pursuing those goals.

What I think some smart, intelligent people who really want to get this stuff done would do is, first of all, be very strong advocates for goals, and second be very strong advocates for a follow-up program to ensure that all of the agencies are complying. If you don't do that, then they send you out here to a committee with these nonwords and trying to dance around and make you look silly.

Don't let anybody make you look silly. Go back and tell them that you have some recommendations for them and you would like for them to do something serious about this business. We are all a little bit, I guess, aggravated, anxious and impatient with this because America has been dealing with this question for years. It is not as if the administration hasn't had enough time—we have been through everything, so we know this business. It is time to set some goals and strong enforcement of those goals. That is all we ask.

Until then, you make these kinds of hearings useless.

Chairman LAFALCE. Thank you. Mr. Thompson.

Mr. THOMPSON. Thank you, Mr. Chairman.

Like the comments from the gentlewoman from California, I am really appalled that a bill designed to make things easier from the testimony today, we have made it more complicated by saying we can't do it. I am even more concerned because even in saying we can't do it, nobody has offered any options as to ways we can accomplish this. Again, it concerns me greatly that some of the issues that we all agree with problems, women-owned businesses, minority businesses, that have not fully participated are still being relegated to a second class status and unless this administration is committed to making the affirmative steps, we are in trouble.

I would admonish the speakers to carry the message back that some Members on the committee are really concerned that you are not making the proper steps that you should in this direction. If you don't, then I think some of the friendship that people have won't last very long.

The HBCU situation concerns me greatly, that we don't see enough value in working with minority institutions who can also work in the business community to help facilitate the involvement. There is nothing affirmative about that in any of the testimony.

I would just say, Mr. Chairman, that I know in your manner of persuasion you can get some things accomplished, but I hope you see the problem that many of us are running into with the testimony presented today. I look to your leadership to help us work through it.

Mr. KELMAN. If I could ask you to look at the results of what has happened in terms of contract awards to SDB's. I don't have the exact figures here, but the Government contract awards to SDB's have increased by approximately one-third over the last few years. They increased dramatically during this last fiscal year.

I think it is unfair to SBA and the agencies that are working very hard on this problem to say that either nothing is being done

or no progress is being made. We are meeting right now the 5 percent SDB goal.

In terms of the small business community as a whole, as we have pointed out, the percentage of Government contract awards going to small business has increased by several percentage points over the last few years. I guess I can't agree with the premise that people in the executive branch are ignoring these problems and not doing anything. The facts and figures speak otherwise, that progress is being made.

Mr. THOMPSON. One thing about this great country of ours is we do enjoy the luxury of differing from time to time.

Mr. KELMAN. I appreciate that.

Chairman LAFALCE. Mrs. Clayton.

Mrs. CLAYTON. Thank you. Not to repeat some of the things that have been said, I associate myself with the remarks Congresswoman Waters made. I think there is a discrepancy between your behavior and your initiative and your lack of embracing a goal. I can't understand the reticence.

You do yourself a disservice and it is not worthy of the kinds of factual information that you have done. You have done all these initiatives and yet the one step that could put that in some planning structure, you refuse to embrace. You refuse to embrace the goals for women.

As to the issue of the constitutional question, I see your preference of referring it to Justice, and I think you are probably correct structurally in doing that. I remind the committee that gender is now part of the protective class along with religion.

Even in the crime bill, crimes against women are defined in the same way as crimes against religion and hate. If women can be protected in issues of crime, they ought to be protected in the issues of opportunities.

The administration as a whole has a very progressive and understood initiative with historical black colleges and universities; yet again it refuses to take opportunities to put it in law. Issues come and go, but putting it into law means it sustains it over the course of an administration. It is a missed opportunity not to put initiatives that you have embraced already in some codification so it can transcend your presence here.

Why do these things if you don't want equal opportunity to have inclusion beyond this administration? My point is to begin to understand how embracing this goal would indeed codify your initiatives and your programs in a far more substantive way than the individual program you are doing.

Again, I think it is a missed opportunity if you don't embrace it, and I would strongly urge that not only SBA but also the Clinton administration give the clear sign that it is all right to have a goal for women, it is all right to have these initiatives put into goals.

Those are my comments, Mr. Chairman.

Chairman LAFALCE. Thank you Mrs. Clayton.

Mr. Portman.

Mr. PORTMAN. Thank you, Mr. Chairman. I appreciate you all being here this morning. I am sorry I couldn't be here for all the testimony. I have a couple of questions. Dr. Kelman, I have had a chance to look over your testimony and my first question has to do

with the Prompt Pay Act. The other question is more general and has to do with what specific steps we have taken in terms of outreach to women to get more women in the process.

With regard to the Prompt Pay Act, it seems to me there has been a lot of criticism of the way SBA in particular has implemented the act. The Chief Counsel for Advocacy at the SBA says for example that agency regulations have largely invalidated the protections and the 30-day pay. That is the reason, as I understand it, we have the 15-day provision in the bill before us today.

Could you comment on what the SBA Chief Counsel for Advocacy has said and whether you in fact, believe that we do need to improve the process?

Mr. KELMAN. I will confess that I am not an expert on prompt pay. It is really just from a point of view of a procurement person, mostly a payment issue. As this issue has come up quite late in the process I would say, we have been working on procurement reform legislation including with the small business community for over a year, and very, very late in the process this issue of fast pay and a 15-day payment was suddenly raised.

It is not an area where technical procurement people know that much about it. It is a finance issue. I understand we are on a very rapid basis trying to learn more about this on the procurement end so we can comment on these various proposals.

To my understanding, to say that agencies need to pay in 15 days rather than the current statutory 30 days, first, is not consistent with standard commercial practice which typically allows a 30-day payment period.

Second, in the case of some agencies, I think some agencies can do this now and some are doing it now. Other agencies it would be severe strains on their current financial systems. There are issues about discounts under the Prompt Pay Act and implications for the taxpayer of moving away from standard commercial 30-day practice.

We are on the procurement end trying to learn more about this issue. It has come in very late in the process, raised to us suddenly so we are consulting with our colleagues on the finance side. I don't know if Bob knows anymore about the statement by the Office of Advocacy.

Mr. PORTMAN. In that you do address it in your testimony, I would ask you to look at it again, to look at it in the context of H.R. 4263 generally.

Mr. KELMAN. There is a meeting going on today. We have been asked to comment very quickly and we are concerned there not be a rush to judgment about making what could be a very negative change in current provisions.

Mr. PORTMAN. I should also note that there is a provision for electronic transfer within 15 days. So that while current commercial practices might be 30 days, we are talking about electronic transfers that might be done in a shorter period of time. That there are problems in the current system, and that if this isn't the right way to address it, how can we address the current problem of people getting paid at small businesses who can't afford it?

The second question has to do with the goals for increasing procurement opportunities for women. You talked in your testimony



and there has been discussion here today regarding steps that the SBA is taking. Can you give us some example of taking steps, outreach to women to try to increase the percentage and what exactly are we doing in terms of the 5 percent goal?

Ms. PARROTT-FONSECA. Let me answer by saying at GSA—and I would like to think that the administration by its appointments has demonstrated to the GSA community how serious we are in terms of commitment.

Let me go on to say that previous to this administration we had one woman on the executive level that had anything to do with procurement and we had no black males. There was no diversity at the top. Right now we have three regional administrators that are African-American, which is very significant.

We have a Deputy Administrator Julia Stash, who is a noted promoter of women. She is a woman and was the first CEO of a major development corporation. Myself, I would like to think that I have a lot of background in training and I was appointed to the position of Director of the Small and Disadvantaged Business Program.

I mention these things to point out that it is important to have support from the top and I have gotten that support in terms of bolstering the resources of my office. The first thing we concentrated on was the compliance and training aspect.

Previous to this administration there was no strict enforcement or establishment of aggressive subcontracting on major construction and other procurements. In addition to that, we suffer from an institutional reluctance, for lack of a better way of saying it, and we have embarked on a very, very progressive program of training which will lead into a change in how we critically evaluate our managers which I think is important for real change.

In addition, we have increased dramatically our outreach and advocacy to both disadvantaged and the women-owned business community in a number of ways. I have to agree that with Congresswoman Waters when she says that there are many businesses lined up to do business, and we recognize that. So we have a multifaceted approach in terms of how we deal with small—with disadvantaged and women-owned businesses.

For example, to give you a real concrete example, in coming into this administration, we recognized that there are certain barriers in the procurement process and certain barriers in terms of industries, and we noted that the GSA buys a billion dollars worth of cars, about 52,000, to be exact and that last year we did not—I bring this example in terms of the auto industry because what we did and what we are doing that is far different than the past is that we are bringing the services that actually buy the commodities together with the industries and with the constituency groups.

So, we have been holding a series of technical workshops for minority and women car dealers and we found—we just had one last weekend and expected about 50 and we got 127 car dealers. The remarkable thing was that these car dealers, both minority and women are real players. They are not amateurs in any way and can compete for GSA business.

So, we are working with both industry and manufacturers to make that happen. GSA buys and sells 6,000 different items and

we have had to look at those areas in which we have zeroes. I am here to admit that. We are focusing on those areas.

We have a model project that we are working with the Public Building Service. Wherever we are building a Federal building we are going in early and making sure and ensuring that the minority and the women-owned business community knows about the project. I am talking 2 years out so that there will be enough time for joint ventures and other creative opportunities for minority and small business. I am impassioned about this and could talk about this all day.

This is my life's work. I would like to think that my staff has been motivated because of the leadership support that we are getting. Not to say that we can't do more, we have to do more.

Mr. PORTMAN. Has GSA seen any results from its outreach efforts?

Ms. PARROTT-FONSECA. Not number results, but results in terms of contacts being made. I think that what is happening is the word is getting out and people are contacting us. Whereby in past years I have been told by many businesses that they had given up, and even though they might have been successful in private industry or successful with other agencies, that our complicated processes and the fact that the attitudes were not one of inclusion prohibited and prevented them from being successful.

Mr. PORTMAN. Thank you for your answers.

Thank you, Mr. Chairman.

Chairman LAFALCE. Thank you. Too bad we are not discussing something non-controversial like abortion.

Mr. KELMAN. I have a prepared statement on that as well.

Chairman LAFALCE. These are very, very controversial issues. Let me try to discuss some of them with you.

What are the pros and the cons of including the severely handicapped individual-run business within the socially and economically disadvantaged category? I am asking you to discuss aloud the pros and the cons. I will start.

Obviously, the pro is clearly they are socially disadvantaged, economically disadvantaged, so why don't you include them. The argument against is, wait a minute, this is an affirmative action program that you have created primarily for blacks. If you start including socially and economically disadvantaged, that could easily diminish the number of contracts going to blacks, and there is another program for the severely handicapped, and don't bring about a confusion of the two programs.

But yet it doesn't satisfy a disabled person emotionally to just say there are other programs. I am socially and economically disadvantaged, so include me in that class. My heart goes out to them, although I also see a diminution of the primary purpose of the program that was created primarily for the black community.

Sometimes you wish the problem would just go away except when the severely handicapped come to your office and say we are here, we are not going to go away. Somebody says I am going to offer an amendment to include the disabled. I am looking to the administration for guidance. Do you want to discuss the pros and cons?



Mr. KELMAN. It is probably all too rare in public life that people are willing to think out loud the way you just did.

Chairman LAFALCE. It gets me in a lot of trouble.

Mr. KELMAN. I am not sure what I have to add—you have expressed both the human issues at stake here extremely eloquently and the competing public policy considerations. You have—a number of members of the committee have asked the administration to try to develop expeditiously a position on some of the other issues that are expressed in some of these amendments.

Chairman LAFALCE. Let's just stick to this issue. Are you adequately educated as of this point in time to discuss what programs we do have for the severely handicapped as far as accessing Government procurements?

Mr. KELMAN. There is one very large program, the Javits Wagner O'Day Program, under which employees at sheltered workshops, blind, severely handicapped, produce this pen that I brought with me, and the paper that most of us use in the executive branch, and helmets for the military and a large range of products.

Chairman LAFALCE. That is primarily not for profit institutions?

Mr. KELMAN. That is correct, where the severely handicapped work.

Chairman LAFALCE. This is different. We are talking about a business owned and operated by the severely handicapped. Do we have any special programs for that?

Mr. NEAL. Businesses owned by severely handicapped can now access the small disadvantaged business program. Right now that is restricted to DOD, so we were looking at the expansion to civilian agencies to offer a considerable market to them.

Chairman LAFALCE. You are talking about the 1207 Program?

Mr. NEAL. Yes.

Chairman LAFALCE. What about under the 8(a) Program?

Mr. NEAL. I am not sure about that, Mr. Chairman.

Chairman LAFALCE. You are saying that under section 1207 the severely handicapped are presently included?

Mr. NEAL. Yes.

Chairman LAFALCE. Would it follow that since the administration position seems to be to apply 1207 across-the-board, that you probably would then want to apply the inclusion of severely handicapped within socially and economically disadvantaged across-the-board?

Mr. NEAL. One of the issues that we are examining is that the situation that the proposal would set up would be an automatic assumption of inclusion and what we have been doing under the SDB Program now is looking at it on a case-by-case basis as the individual approaches us to ask for inclusion under the SDB Program.

Chairman LAFALCE. Right now the present system puts an onus on the disabled to obtain specific case by case approval from SBA. If you were to include them specifically, then they wouldn't have this burden, you would almost have the burden to justify excluding them.

Mr. NEAL. That is correct.

Chairman LAFALCE. All right, fine. Now, to be in the 8(a) Program one must be socially and economically disadvantaged. Now

the 1207 Program also has the socially and economically disadvantaged criteria, correct?

Mr. NEAL. Correct.

Chairman LAFALCE. Yet the SSBIC Program, in defining who can get loans from SSBIC, is socially or economically disadvantaged. I don't know if you are aware of that, but it is. That is very often misreported in the press. As they deal with a specific loan made by one SSBIC, they frequently say you have to be socially and economically disadvantaged. That program is specifically for both socially and for economically disadvantaged persons.

You seem to opt out of a firm position as to what it should be. It is my intention to proceed in the conjunctive, requiring socially and economically disadvantaged. There is going to be an amendment, however, to go to the disjunctive, either/or.

Does anybody want to comment on that?

Mrs. MEYERS. May I, Mr. Chairman?

Chairman LAFALCE. Yes, Mrs. Meyers, please.

Mrs. MEYERS. Would you like—well, my concern—I guess under 8(a), which is socially and economically disadvantaged, there has been absolutely no inclusion of women. I mean, of the 4,000 to 5,000 participants over the years, 14 have been Caucasian women and if you include minority women, the total is only 400. So it is something less than 10 percent if you include both minority and Caucasian, and literally Caucasian women are locked out of the 8(a) Program.

Now, I guess I assumed that socially or economically disadvantaged would give more inclusion for women in the SBIC Program, and I would hope that maybe we would examine that before we made any specific changes, and I would like to think that we would be opening programs more than closing programs, so maybe you could comment on the chairman's question kind of in light of my understanding.

Chairman LAFALCE. I want to comment—whenever we open programs to some, we are closing them to others, so we have to be careful.

Mrs. MEYERS. You bet.

Chairman LAFALCE. As to the specific policy that we want to effectuate, I always think we are much safer if we say socially and economically disadvantaged, because then the program isn't going to be ripped off. If people come in to the program and they are multimillionaires and you have a program especially for them, other people will start looking at that program saying why? They are not in need of help. That is why I personally favor the conjunctive. But what do you think?

Mr. NEAL. With respect to that position, we had indicated in my testimony that we are in support of the removal of the economically disadvantaged requirement for the 1207 Program.

Chairman LAFALCE. So that you are not in favor of section 1207 being applied across-the-board because right now it is in the conjunctive. Is that OFPP policy.

Mr. KELMAN. That is administration policy.

Chairman LAFALCE. You are calling for a change, not an extension of section 1207 in that respect?

Mr. NEAL. Yes.

Chairman LAFALCE. What about the Armed Services bill? What does that bill do?

Mr. NEAL. We haven't offered any changes to the Armed Services bill as of yet.

Chairman LAFALCE. The bill was reported out of committee and they say it is going to the floor tomorrow——

Mr. KELMAN. That is in the Senate.

Chairman LAFALCE. In the Senate bill, do they retain the conjunctive?

Mr. KELMAN. Yes.

Chairman LAFALCE. Are you going to be recommending a change in the 8(a) Program, too?

Mr. KELMAN. In this case, the administration is responding to an amendment that was offered. We have generally taken the position with regard to the development of the procurement reform legislation in both the Senate and the House, we have made many suggestions, many of which have been accepted by our colleagues in Congress on both sides of the aisle, others which haven't been accepted. We have generally taken the position that we are not going to go if we have made a suggestion—if something we have brought up has not been accepted in general, we are not going to go to the floor with a floor amendment or whatever. So this issue has not come up, to my knowledge, in the discussions in the Senate or in the House prior to——

Chairman LAFALCE. Where do you address this issue in your testimony?

Mr. KELMAN. SBA spoke on this issue. It was not in my testimony.

Mrs. MEYERS. May I add something for clarification? If you just said economically disadvantaged, all of us could live with that. Under the 8(a) Program, however, when you say socially and economically, it means that if you are a minority you are automatically assumed to be socially disadvantaged.

Chairman LAFALCE. That would be a conclusive presumption rather than a rebuttable presumption.

Mrs. MEYERS. You are assumed to be disadvantaged. If you are a woman, you have to prove that you are socially disadvantaged, and that is why out of 4,000 to 5,000 participants, 14 have been women. So I have no problem with the economically disadvantaged.

It is having to prove that you are socially disadvantaged that bothers me. Allowing one criteria for one group and another criteria for another group I guess locks it—as the Chairman said, when you allow for some, you lock out the others.

Chairman LAFALCE. We have some problems, too—I mean if you are going to establish a goal for women, is that going to be separate and independent from the goal that presently exists for the socially and economically disadvantaged, or are you going to be able to be in both groups? How are you going to handle it? Not just for accounting purposes but realistically.

You have to come to grips with that. We have to come to grips with that because, in the real world when you give out contracts, it is a real problem, it is not just theoretical.

We have goals for women right now. They are done through negotiation between the SBA and the different agencies, is that correct, Mr. Kelman, and Mr. Neal?

Mr. NEAL. Yes, that is correct.

Chairman LAFALCE. Now, in—do you have a list of each agency and what their goal is?

Mr. NEAL. That can be provided to you.

Chairman LAFALCE. Do you have it with you now?

Mr. NEAL. We have for 1993. We don't have the fiscal year 1994 numbers available.

Chairman LAFALCE. All right. Approximately—do you know off-hand for the GSA what the goal for women-owned businesses is for GSA?

Ms. PARROTT-FONSECA. For women-owned businesses, it is 2 percent and the achievement is less than 2 percent, just under 2 percent.

Chairman LAFALCE. Less than 2 percent. Do you have any idea, Mr. Neal, as to what the approximate average is for the agencies on a government-by-governmentwide basis?

Mr. NEAL. On a Governmentwide base for fiscal year 1993 for prime contracts, it was 1.8 percent.

Chairman LAFALCE. That is the goal?

Mr. NEAL. That was the actual achievement. The goal itself was 1.6 percent.

Chairman LAFALCE. So we have a total of 1.6, which is the goal, but the achievement has actually been greater than the goal. Achievement has been 1.8?

Mr. NEAL. That is correct.

Chairman LAFALCE. Which probably means that the goal was not too ambitious. Fair enough statement?

Mr. NEAL. I think we can improve upon that.

Chairman LAFALCE. The question is—to what extent can we improve and what would be an appropriate goal? Some person could say 10 percent, another person could say 8 percent, another person could say 5 percent. If you were to sit down and negotiate on an individual agency by individual agency basis, do you have any idea of what the most realistic goal would be? I mean if we are at 1.8 now, it would seem to me we clearly could have a 2 percent goal. Nobody could deem that to be unreasonable.

Would 3 percent be unreasonable which will be a virtual doubling—1.8, we are striving for 3—would 4 percent, would 5 percent—what is the universe of women-owned businesses out there right now that are applying for contracts? Do we have a handle on that?

Mr. NEAL. What we are doing in preparation for and developing goals for fiscal year 1995 is that we are doing now an industry-by-industry determination of what are available in terms of women-owned businesses and minority-owned businesses, and we are going to be sitting down with the agencies to determine—

Chairman LAFALCE. That is one issue, but I am talking about do we know now of the total number of Government contracts that were available, what percentage of them had women-owned businesses competing for them?

Mr. NEAL. We don't have that data.



Chairman LAFALCE. So we don't know if it was roughly 1.6 or 1.8 percent, whether it was 5 percent, 10 percent or what have you. It seems to me that is relevant—while I am a strong believer in goals, I am also a strong believer that the goals should be realistic aspirations. Aspirations, yes. You don't want to come in with 1.6 if you are at 1.8. That is not aspiring for larger and better, but realistic enough so that if you are doing a great job of trying, you can't have people come in and knock your block off. You have a 5 percent goal and you only come in at 3 percent. You say we doubled it in 1 year, don't knock our block off.

The 1207 Program right now is basically a goal program and it is not mandatory for the agency to have either a set-aside or a 10 percent price differential; is that a correct statement of the law?

Mr. KELMAN. They are authorized to have that.

Chairman LAFALCE. You may. It is not required. To what extent, though, in order to achieve the 5 percent goal under the existing 1207 Program do you actually engage in the set-aside process and utilize the differential?

Mr. NEAL. We don't have exact number as to how many times the agency in comparison to other times determined to use the price preferential in determining the winners.

Chairman LAFALCE. How about OFPP—does anybody have that?

Mr. NEAL. It is not collected under the Federal Procurement Data System. It wasn't a piece of data that we felt we needed to collect from contracting officers in determining the effectiveness of the program.

Chairman LAFALCE. What about set-asides—to what extent in order to reach the 5 percent 1207 goal do we resort to the set-asides.

Mr. NEAL. For fiscal year 1993, 2.8 percent of the dollar amount went to SDB primes.

Chairman LAFALCE. Under the set-aside?

Mr. NEAL. The majority of the cases would be the set-aside since DOD has the majority of the contracts.

Chairman LAFALCE. How many of the contracts—there is a 5 percent goal for DOD. What did they achieve? Was it 5 percent on the nose, 4.8, 5.2—

Mr. NEAL. The accounting for DOD allows them to combine the prime contracts and subcontract achievements for SDB's. For SDB prime contracts they achieved 2.9 percent against a 2.5 percent goal.

Chairman LAFALCE. They achieved 2.9 for what—

Mr. NEAL. 2.9 percent against a 2.5 percent goal.

Chairman LAFALCE. What was that for? What is that category?

Mr. NEAL. Small disadvantaged business prime contractors. With respect to subcontracting, they had a 4.3 achievement and a 5 percent goal.

Chairman LAFALCE. But there is a 5 percent goal on your primes, is that right? Or is that a 2.5 percent on your primes?

Mr. NEAL. The 5 percent goal is a combination of the subcontracting and the prime contracts.

Chairman LAFALCE. Wait a minute. I am confused because you said you had a 5 percent goal on your subcontracts, did you not?

Mr. NEAL. A 5 percent total.

Chairman LAFALCE. What was your goal for your subcontracts.

Mr. NEAL. DOD makes a distinction between their 8(a) awards and SDB awards. We include it when we go against the 5 percent goal, but as far as the scorekeeping here I keep it separate so that I can answer specific questions on 8(a). In essence, I have to give you 3 figures in order to determine how they performed against the 5 percent goal. I have to give you the 8(a) prime contract figure, the small disadvantaged business prime contract figure and the small disadvantaged business subcontracting figure. When we total those goals all together, that should represent 5 percent of the total contracting that goes on within the Department of Defense.

Chairman LAFALCE. All right.

Mr. NEAL. So the first figure with respect—

Chairman LAFALCE. What is the total achievement relative to the goal adding all three of those together?

Mr. NEAL. For DOD alone—

Chairman LAFALCE. Only DOD because DOD is the only one that section 1207 is applicable to.

Mr. NEAL. We receive data from other agencies. With respect to the 8(a) Program, we have 2.5 percent or \$2,976,000,000.

Chairman LAFALCE. Let's just do percentages right now.

Mr. NEAL. The goal is 2.5 percent for 8(a) and actual achievement was 2.4 percent. For SDB prime, the goal was 2.5 percent and the achievement was 2.9 percent. For the small disadvantaged business subcontracting, it was 5 percent and then we have a 4.3 percent achievement against the—

Chairman LAFALCE. Was there any duplication here? In other words, do we have any double accounting?

Mr. NEAL. There should be no double accounting between the 8(a) and SDB primes.

Chairman LAFALCE. If you count your money for a prime contract and part of that money goes to a sub that is minority, aren't you double counting?

Mr. NEAL. When the prime contract is awarded to a SDB, the entire contract is included in the SDB figure.

Chairman LAFALCE. You don't look to who the subcontractors are under that?

Mr. NEAL. No, we don't.

Chairman LAFALCE. If you added up then 4.3, 2.9, and 2.4, that comes to 9.6 actual achievement. Is that correct?

Mr. NEAL. We have—

Chairman LAFALCE. If we have a 9.6 actual achievement, would our 5 percent goal be too small?

Mr. NEAL. The 5 percent goal—with the 5 percent goal we separate it out into prime and then subcontract as a way of going after it, so that we don't dilute the figures. I get twisted around.

Chairman LAFALCE. You gave me your actual achievement. For 8(a), you said 2.4.

Mr. NEAL. 2.4, 2.9, and 2.3. That would be—

Chairman LAFALCE. I can't add those, I have to average them?

Mr. NEAL. No. That is 9, plus. There is no double counting. You were right. I think I have made a misstatement in terms of the numbers because we just count the prime as one 5 percent goal and

then we look at the subcontracting as separate, so that we don't have the situation where you can count the subcontractors.

Chairman LAFALCE. I am confused. You are going to have to come to my office and we will have to go over the numbers and you will have to explain it to me personally.

Do we have any idea of how many existing applicants there are for section 1207 contracts under DOD right now?

Mr. NEAL. To my knowledge, we don't collect the numbers of how many people apply to use—how many people certify that they qualify for these preferences in the set-asides.

Mrs. MEYERS. Mr. Chairman, could I maybe ask something which might clarify and maybe will confuse further? I thought that you had to take this 2.9 as a percentage of total prime dollars and the subcontracting, which is 4.3, as a percentage of total subcontracting dollars. So that we are not necessarily talking about 9.6.

Mr. NEAL. Right. As I was trying to indicate I had made a mistake including the subs and the primes together. They are two separate and distinct goals, 5 percent for prime contracts and there is a 5 percent subcontracting goal.

Mrs. MEYERS. For instance, of the subcontracting dollars it is a very small amount, 4.3 amounts to less. I want to make sure that we all have an understanding and maybe what might be a good idea, because maybe I am confused is to get something on paper about, with an example about how precisely that is figured as a total percentage of DOD dollars.

Mr. NEAL. We can submit something for the chairman with respect to the numbers.

[Mr. Neal's statement may be found in the appendix.]

Chairman LAFALCE. Unless anybody else has questions—Mr. Hilliard, do you have any more?

Mr. HILLIARD. No, thank you.

Chairman LAFALCE. I think we will conclude this morning's hearing. I understand the administration's fervent desire to simplify the procurement process. It is one we all share and yet this must be balanced, too, with the achievement of appropriate socioeconomic goals. I think it is going to be impossible to simply go down the one track without having Members bring up the other side, and hopefully we can achieve an appropriate balance.

We have not discussed potential constitutional difficulties—we did not have the Justice Department here. The Constitution says there shall be no discrimination on the basis of sex, religion, race, et cetera, so we are involved in an affirmative action program, whether it is a set-aside or a differential pricing or simply a goal without the utilization of set-asides or preferential pricing provisions.

I think the Supreme Court in interpreting the constitutionality of what we do—who can predict what the Supreme Court is going to do, but they will want to make sure that the Congress made appropriate findings and was deliberative in the process. Absent that, there is probably going to be a challenge of constitutionality.

If the Congress is deliberative, if the Congress does engage in a meaningful fact-finding process, then I think the probability of constitutional validity is enhanced commensurate with the extent of

the fact-finding and deliberateness. At least that is my reading of the decisions.

So, I hope that this hearing and any future deliberations we might have will shore up whatever policy judgment the Congress finally does make.

I thank you very much.

[Whereupon, at 12:20 p.m., the committee was adjourned, subject to the call of the chair.]



## APPENDIX

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OPENING STATEMENT by  
CONGRESSMAN RICHARD H. BAKER, RANKING MEMBER  
House Committee on Small Business  
Hearing on Amendments to H.R. 4263 on May 24, 1994

Mr. Chairman and other members of the Committee, I thank you for calling this hearing on the amendments to H.R. 4263 and how that legislation will affect the small business community as Congress progresses toward a final procurement reform package. I am genuinely pleased to take part in these hearings since they are designed to afford greater protection to small businesses nationwide from federal laws and regulations directives as we move to increase the efficiency and effectiveness of our government's purchasing system.

As I mentioned previously, the subject matter of these hearings is federal procurement reform. I have submitted one amendment to the Committee that concerns a local preference. This justification for this amendment is that the special relationship between a local community and a federal installation or site of federal work should be recognized by the Congress. The local communities affected by a federal purchasing installation in their area or near the site of federal work undoubtedly provide tax dollars for local infrastructure and other quantifiable support that makes the federal government's activities possible.

I would like to take this opportunity to commend our Chairman for his work on H.R. 4263. He has reviewed the amendment described above and has

expressed a genuine and reasonable concern to me. He was concerned that my amendment would unintentionally favor businesses in the Washington, D.C. metropolitan area. The Chairman and I share the same views on this issue, and that is why I would like to revise my amendment to only apply to rural, local businesses that are bidding on federal procurement activities under the Simplified Acquisition Threshold. I have decided that if we were to define "rural" as the geographic area located outside of all metropolitan statistical areas, my amendment will better serve the small business community which is exposed to the most risk of being left behind in the coming years as our federal government goes to electronic commerce. At this point, I would seek to limit small businesses affected by amendment to those not in a "local area" that is part of a metropolitan statistical area or one of the 184 locations nationwide that enjoy a population of at least 250,000 people as determined by the Bureau of the Census of the U.S. Department of Commerce.

I can not stress enough that my amendment does not affect the federal government ever getting the best price and quality when it is soliciting bids or proposals for work. My amendment only affects the situation where a rural, local business has submitted a bid "at least as advantageous", i.e. equal, to as a bid or offer submitted by a competing company. I want the federal government to get the best price, but I also am seeking to preserve the relationship between the presence of the federal government and a local community.

Mr. Chairman, I look forward to working with you and my other colleagues in the House in moving federal procurement reform in general, and this legislation in particular, forward so that we can assist in making our government more efficient while fostering an environment in which American small businesses can develop and continue to be the engine of economic improvement and job growth in our country. I thank all of the panelists for their participation and thank the distinguished Chairman for exploring this critical issue at this time.

STATEMENT OF REP. FLOYD FLAKE  
BEFORE THE COMMITTEE ON SMALL BUSINESS  
MAY 24, 1994

THE SMALL BUSINESS AND MINORITY  
SMALL BUSINESS PROCUREMENT OPPORTUNITIES ACT

I would like to thank Chairman LaFalce for introducing the Minority Small Business Procurement Opportunities Act, and for convening this hearing to consider proposed amendments and their effects on procurement programs for small business and minority enterprises. Additionally, it is an extreme pleasure to welcome Messrs. Deval Patrick, Roger Johnson, Erskine Bowles and Steven Kelman.

I fully expect to hear insightful testimony and commentary regarding the procurement opportunities that are afforded to minorities through the Small Business Administration (SBA) and other federal agencies. I, along with several of my colleagues, am firm in my belief that the Committee has a duty to ensure the full participation of minorities in all of its programs. This belief is compounded by the fact that procurement programs in the federal government represent golden opportunities for any small business. To the extent that H.R. 4263 expands opportunities for minority owned small businesses, I offer my support. Moreover, as I have become more familiar with the bill's provisions, I also extend my support to other provisions of the bill that recognize the efficacy and value of small business in general, and minority owned business enterprises in particular.

With that said, I point toward two areas of concern. First, the bill as it stands now will allow an agency executive to adjust



the 10% price preference if "available information" suggests that non-disadvantaged business concerns are denied opportunities. This provision is over-broad and grants too much discretion to the agency to eliminate the preference. As groups stated at our last hearing, "available information" is vague, and provides no guidance to the executive branch. The question thus becomes how accurate is the data, and what objective criteria was used in reaching a final determination? Second, the bill also allows agencies to decrease the SDB goal in particular industry codes if a "disproportionate share" of SDB contracts are awarded in that area. Furthermore if there is a finding of a disproportionate share, the agency may take "appropriate actions" to limit the use of set-asides in that industry. Again there is a dilemma because of the vagueness of these of terms of art. I therefore question the definition of "disproportionate share" and "appropriate actions," and suggest that this committee offer some guidance.

Since this committee has not chosen to define these terms and offer concrete guidelines, I intend to offer amendments to correct the vagueness in these terms and provisions. My proposal simply requires agencies to extend advance notice of findings, and to solicit public comment on its proposed actions. The result is that agencies, disadvantaged businesses, and non-disadvantaged business would have an open dialogue on these issues. Additionally, "available information" would be scrutinized, "disproportionate shares" could be questioned, and "appropriate actions" would be defined and taken only after probative and comprehensive consideration. In my opinion, these changes would protect the

interests of all small business concerns, while at the same time, protect markets and procurement activities of minority owned small businesses.

As many are aware, I am also considering offering an amendment to change, for the SDB program only, the \$750,000 personal net worth cap that is already in practice for the 8(a) program. I preface this amendment by recognizing that minority firms have an unusually high failure rate after graduating from the 8(a) program. As recently as 1987 according to a Senate study, approximately 66% of graduated 8(a) firms had failed, 7% were in serious trouble, and 3% were acquired by other firms. Advocates in favor of lifting this arbitrary cap assert that this cap is unfair since no other SBA program has a cap, except the \$6 million business net worth cap for the 7(a) program. This limitation results in the business and its owner's lack of access to credit and capital. The resultant under capitalization is the planted seed of failure. Thus I am most interested in hearing testimony from the witnesses that espouses their opinions and suggestions as to whether we should increase the cap, and if so, to what level.

In closing, I congratulate the Chairman for introducing H.R. 4263, and again thank the distinguished panel of witnesses for taking time to share their views on this bill in particular, and minority opportunities through the federal government in general.

OPENING STATEMENT OF THE  
HONORABLE JOHN J. LaFALCE, CHAIRMAN  
COMMITTEE ON SMALL BUSINESS

Tuesday, May 24, 1994

Hearing on H.R. 4263,

The Small Business and Minority Small Business  
Procurement Opportunities Act of 1994.

The purpose of today's hearing is to continue the Committee's consideration of H.R. 4263, The Small Business and Minority Small Business Procurement Opportunities Act of 1994.

H.R. 4263 makes two major changes in federal procurement law, one of which will greatly assist all small businesses, and the other of which is of major benefit to minority small business. The first would raise the threshold of procurement actions reserved exclusively for small business from the present \$25,000 to \$100,000. This should enable small businesses to obtain an additional \$1 billion to \$2 billion in federal contracts a year.

The second change would create for the civilian agencies a Small Disadvantaged Business (SDB) program like the current "Section 1207" DOD program. Section 15 (g) of the Small Business Act currently establishes an overall governmental goal of 5 percent for SDB procurements and requires agencies to set their own goals in negotiation with SBA. DOD, however, has a statutory goal of 5 percent (10 U.S.C. 2323) and has by statute two powerful procurement tools which it may use to help it attain its goal: (1) It may set-aside procurement actions solely for SDBs, and (2) in unrestricted competitions (where large companies and small companies often compete against each other) it may pay a price differential of up to ten percent to SDBs which are technically and qualitatively capable of performing the requirement. H.R. 4263 will extend these tools to all the civilian agencies. In addition, each agency will be required to establish a minority procurement goal of at least 5 percent of agency dollars.

As you know the Committee, in an effort to accommodate the Administration's desire that the procurement reform legislation be expedited, had originally scheduled a mark-up of H.R. 4263 for May 5, 1994. In preparation for that mark-up, however, a large number of proposed amendments were received both from the small business procurement coalition and from individual Members of the Committee.

A number of the amendments proposed useful adjustments and additions to H.R. 4263. These have now been incorporated in what I believe to be a consensus bi-partisan Committee mark in the nature of a substitute for H.R. 4263.

Among the changes which have been made are the following:

- an amendment, requested by Mr. Flake, to require timely issuance of regulations;

- an amendment, requested by Mr. Fields, to involve the Minority Business Development Agency at Commerce in the new Federal Acquisition Computer Network;
- an amendment, requested by Mr. Dickey to encourage procurement officials to experiment with innovative payment methods;
- and amendments, requested by the small business procurement coalition --
  - (A) to maintain current requirements regarding notice of contracting opportunities and minimum times for the preparation of offers until such procurements can be conducted through the system of electronic commerce announced by the President on October 26, 1993;
  - (B) to specify minimum response times available to small businesses to respond to electronic commerce announcements;
  - (C) to collect minimal data on contracts between \$10,000 and \$100,000 to determine how many opportunities, which are reserved for small businesses, are actually going to small businesses;
  - (D) to require fast payment procedures (15 days rather than 30 days) on contracts under the \$100,000 threshold;
  - (E) to require contracting officials to provide at least an interim response to contract administration related inquiries from small businesses within 30 days; and
  - (F) to allow low-bidder small businesses to appeal to SBA if they are refused the contract for failure to meet "market acceptance criteria" -- for example, supposed inability to supply the volume of product desired by an agency.

In addition, the Committee mark removes some of the provisions of the original H.R. 4263:

- Section 6 of the bill, which referred to certain pilot programs was removed because the Armed Services Committee has removed the pilot programs from H.R. 2238.
- The set-aside for historically black colleges and universities and other minority institutions, the language of which was taken from DOD's current Section 1207 program, was removed.
- The language in section 5 which made specific reference to minority owned media, was also removed.

Some of the proposed amendments, however, were very substantive in nature and raised issues which might be controversial. It was decided, therefore, to postpone the mark-up and to have this hearing at which the Administration could respond to these proposed changes.

The first of these issues is whether the overall Governmental



small business procurement goal should be increased to 25 percent from the present 20 percent.

A second issue is whether, in conjunction with the above, or on a separate basis, there should be established either a 5 percent set-aside with preferential pricing, or a 5 percent overall governmental goal for small businesses owned by women.

The constitutional and policy considerations are not the same for affirmative action efforts based on gender as they are for those based on race. Traditionally Congress has enacted affirmative action programs to remedy past racial injustices, particularly those inflicted upon African Americans. It is only very recently that goals based upon gender have begun appearing in some statutes.

The amendments that may be proposed would set forth a Federal Government-wide gender based affirmative action set-aside or, alternatively, goal of 5 percent of procurement expenditures for women owned businesses. It is important that, if the Committee and the Congress are to adopt such a measure, it be based upon a thorough understanding of the constitutional and policy basis for such a program and a thorough consideration of all the ramifications.

A third issue is whether small businesses owned by socially disadvantaged persons (SDBs) should be exempted from also having their owners be economically disadvantaged.

A fourth issue is whether persons with severe disabilities should be deemed "socially disadvantaged" for the civilian 5% SDB program.

A fifth issue is whether contracts below the small business purchase threshold (\$100,000), in cases where bids are equal, should be awarded by preference to local small businesses.

We have before us to testify today:

Steven Kelman  
Administrator for Federal Procurement Policy  
Office of Management and Budget

Robert Neal  
Associate Deputy Administrator for Government  
Contracting and Minority Enterprise Development  
U.S. Small Business Administration

Joan Parrott-Fonseca  
Director  
Office of Small and Disadvantaged Business Utilization  
General Services Administration

**Statement  
by  
The Honorable Lucille Roybal-Allard**

Committee on Small Business  
Hearing on the Small Business Administration Reauthorization  
503 Prepayment Penalty Relief & Micro-Loan Program

May 24, 1994

Mr. Chairman:

Thank you for holding this hearing which gives us the opportunity to look at Prepayment Penalty Relief for the old 503 guaranteed debenture program and at the SBA's Micro-Loan program.

The prepayment penalty for the old 503 program is unjust. We need to provide relief from this onerous penalty so that these businesses can refinance those old, high-interest-rate loans and put that capital to work creating jobs instead of making interest payments.

I am also happy to have the opportunity to review the SBA's Micro-Loan program. Because of the administrative costs associated with making loans of less than \$25,000 dollars, banks have traditionally avoided doing business in this area.

The Micro-Loan program attempts to remedy this problem and help provide small but needed amounts of capital to small businesses.

I believe the Micro-Loan program is one of the most cost effective of the SBA programs. A small amount of capital in this context can go a long way in helping to get a small business started and in creating jobs.

The question before us today is how best to go about arranging for those small amounts of capital for start-up businesses -- direct loans or guaranteed loans.

Mr. Chairman, I look forward to working with you and with members of this committee to explore these questions and to find solutions that are equitable, fair and meet the needs of small business.

Thank you.

OPENING STATEMENT OF  
CONGRESSMAN BILL ZELIFF (R-NH)  
Small Business Committee  
May 24, 1994

Mr. Chairman,

Thank you for convening this hearing to continue our consideration of H.R. 4263, the "Small Business and Minority Small Business Procurement Opportunities Act of 1994."

I am glad that this Committee is taking the time to examine the ramifications of this proposed reform. I am also glad that we will fully review a number of proposed amendments which I believe will improve this bill.

Procurement reform is a vital part of our efforts to downsize and streamline the federal government. When the government buys \$200 billion worth of goods every year, we should ensure that the American taxpayers are getting a good deal.

As I have said many times, small businesses are ready and eager to do business with the government -- if we don't shut them out of the process. Small businesses who can provide goods and services in a cost-effective manner should be given every opportunity to compete.

Increasing the Small Business Reserve from \$25,000 to \$100,000...as proposed in H.R. 4263...is a positive step which will open the door for many small businesses.

As I have also said many times, however, I must object to the minority set-aside language in H.R. 4263.

The federal government should not intentionally deny contracts to minority businesses -- that is racism. At the same time, the federal government should not intentionally award contracts to minority businesses - that is a quota.

As a businessman, I see quotas as a very disturbing trend. I am hopeful that we will be able to address this disturbing issue fully during mark-up.

I look forward to the testimony from our witnesses.

STATEMENT OF STEVEN KELMAN  
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY  
BEFORE THE  
COMMITTEE ON SMALL BUSINESS  
UNITED STATES  
HOUSE OF REPRESENTATIVES

Mr. Chairman, members of the Committee, I am pleased to appear before you today to discuss the amendments that are being proposed to be added to H.R. 4263, the "Small Business and Minority Business Procurement Opportunities Act of 1994." I want to restate for the record what I stated in my testimony before this Committee on April 28 that the Administration strongly supports the purpose of H.R. 4263. We are working very hard to increase the participation of small businesses, small disadvantaged businesses, and women owned businesses in federal procurement. I believe we are succeeding. As I pointed out in my previous testimony, contract awards and dollars to small businesses continue to increase each fiscal year. I am pleased to note that the same trend is occurring for women owned business firms, although we believe that progress in this area could and should be improved. I would like to commend you, Mr Chairman,



and the members of this Committee for your efforts on these same priorities.

As you know, we are moving closer to Congressional adoption of many of the Administration's procurement streamlining proposals. If all goes as scheduled, the Senate will begin debate tomorrow on S. 1587, a bill that we strongly support. We are looking forward to similar action on pending House legislation in the very near future.

This morning, as you requested, I will discuss the Administration's views on several of the proposed amendments to H.R. 4263. With regard to the constitutionality of proposed set-asides or contracting preferences, however, I must defer to the Department of Justice. They will provide you with answers to these questions when they become available.

First, let me discuss the amendment that would increase the overall small business procurement goal from 20 percent to 25 percent. We are very pleased to see that the small business share of federal contracts is increasing - we exceeded the 20 percent goal for FY 93. The Administration has not had sufficient time to develop a position on the appropriateness of an increase in the goal for small business awards. I understand the desire of the members of Congress to continue pressing for improvements in awards to small businesses.

We will continue to work with the Small Business Administration (SBA) on these goals. OFPP has a history of good cooperation with SBA. I plan to continue that cooperation

and to consult regularly with the Administrator on all procurement issues that affect small businesses.

You also asked for the Administration's position on the establishment of either a 5 percent set-aside with preferential pricing, or a 5 percent governmental goal for small businesses owned by women. Mr. Chairman, I am pleased to note that over the last three fiscal years, agencies contracted with over 10,000 new women owned small businesses. During this same period, awards to those businesses increased from \$2.8 to \$3.2 billion. While the Administration strongly supports contracting with women owned small businesses, it has not had sufficient time to establish a position on the appropriateness of a statutory goal for women owned small businesses. Continued emphasis on awards to women owned small businesses in conjunction with the policies prescribed by Executive Order 12138 and OFPP Policy Letter 80-4, and the women's business outreach programs of the Small Business Administration, will enable us to continue making gains in such awards.

With regard to the question of whether persons with severe disabilities should be deemed "socially disadvantaged," the Administration has not previously considered such a classification for the severely disabled. Certainly we support the need for economic development of such businesses. However, I would recommend that this be studied further. Among other things, we must consider the impact of this designation on

businesses owned by the severely disabled and on government small disadvantaged business (SDB) programs.

We have concerns about the proposed amendment that would establish a procurement set-aside goal for historically black colleges and universities (HBCUs) of 5 percent of the value of annual awards to institutions of higher education. The Administration recognizes and appreciates the important role HBCUs play in higher education, but we do not support a separate goal for HBCUs. We believe that the expansion, to civilian agencies, of the authority for small disadvantaged business set-asides, including authority for HBCU set-asides, will achieve the goals of the Congress and the Administration.

An additional issue raised by your letter concerns singling out minority owned media sources for mention in the 5 percent SDB goal program. As I stated previously, the Administration strongly supports small business, SDB, and women owned business programs. This includes small disadvantaged media concerns as well. I would defer to the SBA on the need for special recognition of these firms.

We have reviewed the proposed amendment that would provide for a local preference where an offer from a local small business concern is as at least as advantageous to the government as any other bid or proposal received. Mr Chairman, the Administration is opposed to this provision because it would give preference to an offeror from one geographic region of the United States over offerors from other geographic regions of the United States.

This would explicitly contradict the goal of electronic commerce (EC), which is to give nationwide visibility of purchase opportunities to small businesses.

In addition to your invitation letter, I have been provided a copy of a revised draft to H.R. 4263. We continue to have the concerns raised in my prior testimony about the regulatory provisions contained in section 5 of the bill. Moreover, the Administration has major concerns about provisions that have been incorporated in the latest draft.

The Administration is strongly opposed to the provisions of draft section 7 that would amend section 8 of the Small Business Act regarding procurement notice. As amended, section 7 would (1) continue to require the 30-day waiting period after the initial 15-day pre-solicitation publication requirement before procurements between \$25,000 and \$100,000 could be awarded unless they are conducted through the Federal Acquisition Computer Network (FACNET), (2) require agencies to accept offers for a period of ten days when they fall within the posting requirements of section 8(e), and (3) establish minimum solicitation periods for various types of procurements that will be processed through the EC system. Mr Chairman, each of these amendments are directly contrary to the Administration's efforts to simplify and streamline federal contracting. If enacted, they would (1) severely inhibit the ability of procurement officers to meet the needs of their customers, (2) take full advantage of the speed at which procurements effected through EC can be processed, and (3)



add new burdens to a procurement workforce that is undergoing reductions in personnel. As indicated in my previous testimony, the Administration favors the provisions of S. 1587 in this area. We are willing to continue the 15-day notice period until the government-wide EC system becomes operational.

I am also concerned about section 8 of the bill which, among other things, imposes a 5-year requirement on agencies to report on procurements between \$10,000 and \$100,000 in conformity with the current procedures for the reporting of contract awards in excess of \$25,000. This is a very burdensome requirement which we believe is not necessary. Currently, awards of \$25,000 and under are reported by agencies on Standard Form 281. This report identifies the type of award and the type of business that received the award. The form requires agencies to identify whether an award is to a large business, small business, SDB, or woman owned small business. We believe this is adequate information to track our efforts in awards under the simplified acquisition threshold. As proposed, the reporting requirements of section 8 are overly burdensome and are not supported by the Administration.

We are also concerned about the impact of the requirements of the amendments proposed by section 8 that would amend the Prompt Pay Act to mandate payments under the simplified acquisition threshold within 15 days of the receipt of a proper invoice for products delivered or services rendered. This requirement places an unrealistic burden on the government

procurement payment systems, is inconsistent with commercial practice (which typically establishes 30-day payment periods), and exposes the government to potential fraudulent activity by contractors. The government found it necessary to protect itself from fraudulent activities by limiting the use of such payment procedures to purchases under \$25,000 and where there is a significant geographical distance between the purchasing office and the receiving activity. The Administration does not support these provisions. However, we could support the provisions in the original version of H.R. 4263 that proposed the use of fast pay procedures, "wherever circumstances permit," when awards are made to small businesses under the simplified acquisition threshold.

Mr. Chairman, I would like, in this connection, to use today's hearing to express my concern that if we continue to place restrictions on the simplified procedures authorized under the new simplified acquisition threshold, it is in danger of becoming a simplified procedure in name only.

We also have very strong objections to the provisions of draft section 10 of the bill. This provision would expand the authority of SBA, under the Certificate of Competency Program, to provide for an SBA review of any determination of a government procurement officer that a product offered by a small business fails to meet the market acceptance criteria specified in a solicitation for award of a contract for a commercial product.

These commercial market acceptance criteria are intended to

replace detailed specifications currently being used by agencies to procure commercial items. Vice President Gore appeared on the David Letterman program last fall with goggles and a government ashtray to illustrate the absurdity of lengthy government specifications for everyday commercial products. These lengthy specs arise to prevent the government from being cheated by some loophole when the government opens up bids to products that have never achieved any acceptance in the commercial marketplace. The commercial market acceptance test in the procurement reform legislation is a way to solve the absurdity the Vice President illustrated on national television. If the government can say that before you sell an ashtray to the government you have to show that you've succeeded in selling your ashtray to some real live consumers outside the government, then we don't need these complicated specs. The specs can be much simpler -- because we can assume that if consumers have been willing to spend their own money on the product, the government can have a comfort level that there's not some loophole in the spec where an unscrupulous company can take advantage of us. If this provision is interfered with, we're back to the lengthy spec, and we've sabotaged an important goal for the Vice President.

This amendment constitutes a major expansion of the existing goals of the COC program, which involves decisions about contractor responsibility -- the question of whether the contractor is able to do the work -- and making the program include evaluation of the government's requirements. Under this

provision, if SBA issues a certificate of competency (COC), the agency would have to award the contract to the small business concerned. Mr. Chairman, this proposal is seriously flawed. It is directly contrary to the recommendations of the Vice President in the report of the National Performance Review and is therefore unacceptable to the Administration.

As I indicated earlier, we will shortly have consideration of procurement streamlining in the Senate. The Administration looks forward to working with you, Mr Chairman, and the other Committees of the House in your consideration of procurement reform as we strive to make procurement streamlining a reality.



**FEDERAL PROCUREMENT DATA SYSTEM (FPDS)  
SUMMARY CONTRACT ACTION REPORT (\$25,000 or Less)**  
(Dollars in thousands, rounded to the nearest thousand)

INTERAGENCY REPORT  
CONTROL NUMBER  
0208-GSA-QU

<b>CIVILIAN AGENCIES</b>				<b>DEPARTMENT OF DEFENSE</b>			
Net dollars and number of actions where anticipated value of instrument is \$25,000 or less				Net dollars and number of actions where amount obligated on action is \$25,000 or less			
<b>A. REPORT PERIOD</b>		<b>B. REPORT TYPE (X one)</b>		<b>C. REPORTING AGENCY CODE (FIPS 95)</b>			
FY	QTR	ORIGINAL	REVISION				
<b>D. REPORTING AGENCY NAME</b>				<b>E. CONTRACTING OFFICE CODE</b>		<b>F. CONTRACTING OFFICE NAME</b>	

**PART I - PRIME CONTRACT ACTIONS OF \$25,000 OR LESS**

	PROCUREMENT METHOD	Number of Actions (a)	NET DOLLAR AMOUNTS				
			Small Business Concerns (b)	Large Business Concerns (c)	Domestic Outside U S / Foreign (d)	Other Entries (e)	Total Dollars (f)
<b>NEW AWARDS AND MODIFICATIONS</b>	1 Tariff or Regulated Acquisitions						
	2 Contract for Foreign Government or International Organization						
	3 Small Purchases (FAR Part 13)						
	4 Delivery Orders - GSA Schedules Only						
	5 Delivery Orders - Other Federal Schedules						
	6 Delivery Orders - All Other						
	7 Other Procurement Methods						
	8 TOTAL NEW AWARDS AND MODIFICATIONS						
<b>COMPETITION</b>	9 Competed						
	10 Not Competed						
	11 Not Available for Competition						
<b>MODIFICATIONS</b>	12 TOTAL MODIFICATIONS (Excluding Line 3)						

**PART II - SELECTED SOCIOECONOMIC STATISTICS**  
(Includes both new awards and modifications)

PREFERENCE PROGRAMS			TYPE OF CONTRACTOR		
CATEGORY	Number of Actions (a)	Total Net Dollars (b)	CATEGORY	Number of Actions (a)	Total Net Dollars (b)
13 Small Business - Small Purchase Set-Aside			18 Small Disadvantaged Business		
14 Small Business Set-Aside			19 Woman-Owned Small Business		
15 Labor Surplus Area Set-Aside			20 Sheltered Workshop		
16 Combined Labor Surplus/ Small Business Set-Aside					
17 8(a) Awards					

<b>G. PERSON SUBMITTING REPORT</b>							
NAME		SIGNATURE		TELEPHONE NUMBER (Include area code)		DATE SUBMITTED	

# FEDERAL PROCUREMENT DATA SYSTEM (FPDS) INDIVIDUAL CONTRACT ACTION REPORT

 INTERAGENCY REPORT CONTROL NUMBER  
0206-GSA - QU

1. REPORTING AGENCY (FIPS 95)				2. CONTRACT NUMBER (Left justified)												3. MODIFICATION NUMBER (Left justified)				4. CONTRACTING OFFICE ORDER NUMBER (Left justified)																																																			
1 2 3 4				5 6 7 8 9 10 11 12 13 14 15 16 17 18 19												20 21 22 23				24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43																																																			
5. CONTRACTING OFFICE				6. ACTION DATE				7. TYPE OF DATA ENTRY				8. REPORT PERIOD				9. KIND OF CONTRACT ACTION				E Order under indirect Delivery Contract (DOC) F Order under BDA G Order/Modification Under Federal Schedule H Modification I Termination for Default J Termination for Convenience K Initial Load of Federal Schedule Contract																																																			
Code 39 40 41 42 43				CY MO 44 45 46 47				A Original B Deleting C Correcting 48				FY DD 49 50 51 52				A Initial Letter Contract B Definitive Contract C New Definitive Contract D Small Purchase Procedure 53																																																							
10. DOLLARS OBLIGATED OR DEOBLIGATED THIS ACTION (Round to nearest 1000, right justified) (Use lead zeros)												11. TYPE OF OBLIGATION				12. PRINCIPAL PRODUCT OR SERVICE (FPDS Product/Service Code Manual)				13. PRINCIPAL STANDARD INDUSTRIAL CLASSIFICATION (SIC) CODE (OMB SIC Manual)																																																			
53 54 55 56 57 58 59 60												A Obligated B Deobligated 61				Code 62 63 64 65				Code 66 67 68 69																																																			
14. ADVISORY ASSISTANCE SERVICES AWARD												15. CONTRACTOR NAME												16. CONTRACTOR ESTABLISHMENT CODE																																															
Y - Yes N - No 70												71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100												101 102 103 104 105 106 107 108 109																																															
17. PRINCIPAL PLACE OF PERFORMANCE (State or U.S. outlying area, city or place - FIPS 55)												OR FOREIGN COUNTRY (FIPS 10-3)				18. CONTRACT FOR FOREIGN GOVERNMENT OR INTERNATIONAL ORGANIZATION												19. TARIFF OR REGULATED (Pre-CICA)																																											
State City 110 111 112 113 114 115 116												117 118				Y - Yes N - No 119												Y - Yes N - No 120																																											
FOREIGN TRADE DATA												20. NO. OF BIDDERS OFFERING FOREIGN ITEM												21. BUY AMERICAN ACT PERCENT DIFFERENCE				22. COUNTRY OF MANUFACTURE (FIPS 10-3)				23. SYNOPSIS OF PROCUREMENT PRIOR TO AWARD												24. TYPE OF CONTRACT OR MODIFICATION																											
121												122 123				124 125				A Synopsized prior to award B Not synopsized due to urgency C Not synopsized for other reason 126												A Fixed Price B Cost Plus Award-Fee C Remeasurement D Firm Fixed-Price E Fixed-Price with Economic Price Adjustment F Fixed-Price Incentive 127												G Cost Plus Award-Fee H Cost Plus No Fee I Cost Sharing J Cost Plus Fixed-Fee K Cost Plus Incentive-Fee L Time and Materials M Labor Hour 128																											
25. CICA APPLICABILITY												26. SOLICITATION PROCEDURES (Complete only if Item 25 = A)												27. AUTHORITY FOR OTHER THAN FULL AND OPEN COMPETITION (Complete only if Item 25 = L)												28. NUMBER OF OFFERS RECEIVED (Complete only if Item 25 = A)												29. EXTENT COMPLETED																							
A CICA Applicable B Small Purchase Procedure C Subject to Statute other than CICA D Pre-CICA 129												A Full and Open Competition - Sealed Bid B Full and Open Competition - Competitive Proposal C Full and Open Competition - Combination D Architect - Engineer E Basic Research 130												A Unique Source B Follow-on Contract C Unsolicited Research Proposal D Patent / Data Rights E Utilities 131												A One B More than one 132												A Completed Action B Not Available for Competition C Follow-on to Completed Action D Not Completed 133																							
30. TYPE OF CONTRACTOR												31. WOMAN OWNED SMALL BUSINESS												32. PREFERENCE PROGRAM												33. ESTIMATED CONTRACT COMPLETION DATE												34. CONTRACTOR'S TIN																							
A Small Disadvantaged Business B Other Small Business C Large Business D Sheltered Workshop E Nonprofit Educational Organization F Nonprofit Hospital 134												G Other Nonprofit Organization H State/Local Govt - Educational I State/Local Govt - Hospital J Other State/Local Government K Foreign Contractor L Domestic Contractor Performing Outside U.S. 135												A Directed to Sheltered Workshops B Bids Program C Combined Labor Surplus Area Small Business Set-Aside 136												D Small Business Set-Aside E Labor Surplus Area Set-Aside F Bid Preference G Buy Indian/Set-Aside/Determination Act H No Preference Program or Not Listed 137												CY MO 138 139 140 141												142 143 144 145 146 147 148 149 150											
35. SUBCONTRACTING PLAN (Small and Small Disadvantaged Business)												36. SUBJECT TO LABOR STATUTES												37. COMMON PARENT'S NAME												38. COMMON PARENT'S TIN																																			
A Required B Not Required 139												A Walsh-Healey Act, Manufacturer B Walsh-Healey Act, Regular Dealer C Service Contract Act D Davis-Bacon Act E Not Subject to Walsh-Healey, Service Contract, or Davis-Bacon Act 140												151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180												181 182 183 184 185 186 187 188 189																																			
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SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM (Applicable to AGR, DOD, DOE, DOI, DOT, EPA, GSA, HHS, NASA, and VA)

42. DEMONSTRATION TEST PROGRAM				43. EMERGING SMALL BUSINESS				44. EMERGING SMALL BUSINESS RESERVE AWARD				45. SIZE OF SMALL BUSINESS NUMBER OF EMPLOYEES				or AVERAGE ANNUAL GROSS REVENUE			
Y - Yes N - No 200				Y - Yes N - No 201				Y - Yes N - No 202				A 50 or less B 51 - 100 C 101 - 250 D 251 - 500 E 501 - 750 F 751 - 1,000 G Over 1,000 203				M 1,000,000 or less N 1,000,001 - 2,000,000 P 2,000,001 - 3,500,000 R 3,500,001 - 5,000,000 S 5,000,001 - 10,000,000 T 10,000,001 - 17,000,000 Z Over 17,000,000			

46. RESERVED FOR FPDS												47. OPTIONAL REPORTED DATA ELEMENTS											
204 205 206 207 208 209 210 211 212 213												214											

48. FOR AGENCY INTERNAL USE

49. CONTRACTING OFFICER OR REPRESENTATIVE

a. TYPED NAME			b. SIGNATURE			c. TELEPHONE NO.			d. DATE SUBMITTED (YYMMDD)		
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FAR (48 CFR) 51.204-2(a)

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U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20516

Honorable John J. LaFalce  
Chairman  
Committee on Small Business  
House of Representatives  
Washington, DC 20515-6315

Dear Mr. Chairman:

The following information is provided to clarify testimony at the recent Small Business Committee hearing in connection with amendments to H.R. 4263.

1207 Awards

The Small Business Administration does not officially request figures from the Department of Defense regarding the distribution of contract awards in connection with the 1207 Program. DOD does provide SBA with access to this data, and a review of the available information reveals that in fiscal year 1993 awards to small disadvantaged businesses totalled \$6.183 billion or 5.3 percent of total contract dollars. Of this \$6.183 billion, \$2.773 billion, or 2.4 percent of DOD total prime contract dollars of \$116.0 billion, was awarded through the 8(a) Program; \$1.893 billion, or 1.63 percent, was awarded directly without advantage of the 1207 preferences; \$515.0 million, or 0.44 percent, was awarded with the price preference; and \$1.002 billion, or 0.86 percent, was awarded through a small disadvantaged business set-aside. We would defer to DOD if more detailed information is required.

DOD Small Disadvantaged Goals

SBA negotiates goals annually with each federal agency. The DOD 1207 Program includes a 5 percent goal for Small Disadvantaged Business. Based on the 1207 requirement, in FY 1993, DOD established a 5 percent goal for prime contracting with SDB's as well as a 5 percent goal for subcontracting with SDB's in connection with SBA's goaling process.

Although DOD does not submit a distinct goal for 8(a) awards, SBA divides the 5 percent prime contracting goal evenly between awards through the 8(a) Program, 2.5 percent, and other small disadvantaged business awards, 2.5 percent. In fiscal year 1993, DOD awarded \$2.773 billion, or 2.4 percent, through the 8(a) Program and \$3.410 billion, or 2.9 percent, to other small disadvantaged businesses.

Honorable John J. LaFalce

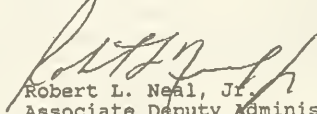
Overall, DOD exceeded their 5 percent small disadvantaged business goal with a total of 5.3 percent for 8(a) awards and other small disadvantaged business awards combined.

Regarding subcontracting, DOD large prime contractors awarded \$1.914 billion, or 4.3 percent, of total subcontracting dollars to small disadvantaged businesses.

It should be noted that the subcontracting percentage is based on subcontracting dollars, while the prime contract percentage is based on total awards directly from DOD. Since the prime and subcontracting percentages are each derived from a different base they cannot be combined. However, small business prime contracting dollars combined with small business subcontracting dollars can be shown as a percentage of total prime contracting dollars without any double counting. In all, 7.0 percent, or \$8.097 billion, of the \$116.0 billion awarded by DOD went to small disadvantaged businesses as the result of either a prime contract award or through a subcontract award.

Please let me know if you need any additional information.

Sincerely,



Robert L. Neal, Jr.  
Associate Deputy Administrator for  
Government Contracting and  
Minority Enterprise Development



STATEMENT OF JOAN PARROTT-FONSECA  
DIRECTOR OF SMALL AND DISADVANTAGED  
BUSINESS UTILIZATION  
GENERAL SERVICES ADMINISTRATION  
BEFORE THE  
COMMITTEE ON SMALL BUSINESS  
UNITED STATES HOUSE OF REPRESENTATIVES  
MAY 24, 1994

Mr. Chairman and members of the Committee, my name is Joan Parrott-Fonseca. I am the Director of the Office of Small and Disadvantaged Business Utilization, of the General Services Administration (GSA). I have been in this position for only a few months now, but I bring to the Federal Government extensive experience in small and disadvantaged business utilization and development at the state and local level in the governments of New York and the District of Columbia. Administrator Roger Johnson asked that I testify on behalf of the GSA, and I am pleased to appear before you to provide the agency's views on H.R. 4263, the "Small Business and Minority Business Procurement Opportunities Act of 1994." GSA is a strong proponent of small and disadvantaged businesses participation in Federal contracting. Small and disadvantaged businesses generate a substantial number of jobs for the American people and we endorse efforts to strengthen small businesses, including disadvantaged and women-owned businesses.

You have asked that we address seven specific issues in connection with amendments offered to the basic bill and have invited us to address other aspects of the bill as well. Three of the issues relate to possible constitutional questions regarding preferences for women-owned businesses. GSA defers to the Department of Justice on these issues. Nevertheless, in the past GSA has averaged less than 2% participation of women-owned businesses in our annual procurements. We do not believe this participation level is satisfactory. GSA is committed to utilizing all available means to improve the participation of women-owned businesses in its procurements. We will meet with women's groups, women's trade organizations and women business owners to receive input on ways GSA can increase its support of women-owned businesses.

The remaining questions of the Committee relate to increasing small business utilization goals from twenty to twenty-five percent of all Federal contracts; amendment of the current requirement that a small disadvantaged business be disadvantaged both economically and socially by substituting the single criterion of social disadvantage; adding "persons with severe disabilities" to the disadvantaged business program; and adding a preference for local businesses in tie-bid situations.

We believe that individual government agencies should strive for the greatest possible participation by small businesses in Government contracts. GSA's current participation rate for small businesses is in excess of forty percent.

The Administration is considering the amendment which would raise the governmentwide statutory minimum for small business participation from twenty to twenty-five percent and we offer no opinion on this amendment at this time. We support and encourage increased small business participation within the Executive Branch with increased emphasis on assurance of integrity of implementation. In addition, we plan to increase small businesses participation in procurements, specifically underutilized women and minority-owned businesses, through targeted and strategic outreach programs, supporting mentor programs and other educational programs.

GSA defers to the Small Business Administration on the amendment which proposes striking "economically disadvantaged" from the portion of the Small Business Act which establishes Governmentwide goals.

Another amendment would add "persons with severe disabilities" to the definition of socially disadvantaged for the purposes of measuring small disadvantaged business contracting goals. We believe that this proposal demands further study and we defer comments on this amendment. However, we believe that the term "persons with severe disabilities" should be specifically defined in the statute to reduce implementation difficulties.

We do not support a preference for "local" small businesses when a tie bid is involved. We do not believe that a preference is needed. Tie bid situations are infrequent in Federal acquisitions. The amendment adds an additional regulatory burden to solve a nearly non-existent problem. In addition, the proposal conflicts with the existing scheme in section 15 of the Small Business Act, which gives preference to labor-surplus area concerns in set-aside programs in tie bid situations.

We are concerned about changes in section five that would require the Administration to establish government-wide procedures or guidelines to be used by contracting officers in establishing subcontracting plan goals. We believe that guidelines for subcontracting plan goals should be tailored by individual agencies because the individual agencies are best situated to evaluate the procedures which would be most effective in achieving goals with respect to types of procurements for that agency. In addition, adding a layer of government-wide procedures will slow implementation of agency specific plans.

The bill proposes to weaken the advance and progress payment standards in 41 U.S.C. section 255. GSA believes that existing advance and progress payment standards in 41 U.S.C. section 255 reflect a proper balancing of Government and small business interests. We believe that the law should retain these prudent conditions.

Section 5 of the bill would establish time frames for acquisitions using the Federal Acquisition Computer Network System (FACNET). We believe that time frames should not be established until after agencies are able to determine, based upon their experience with FACNET, what is optimal. Time frames can then be established by regulation rather than through a specific statutory provision.

GSA does not support the fast payment provisions in section 3 of the bill that may be applied to purchases under \$100,000 where the awardee is a small business. The proposed amendment would obligate the government to pay within 15 days of the receipt of an invoice, regardless of whether the government has accepted delivery of, or inspected, the products or services. This places the government at a severe risk of paying for defective products and services and even for products never received. In addition, the government does not currently have payment procedures in place which would allow Federal agencies to meet the proposed payment time frame. Each government failure to meet the proposed time frame will result in increased interest payments. Furthermore, the government will incur increased expenses, under the Debt Collection Act, to recover overpayment. We support exploring alternatives to this amendment which would permit agencies to expedite payments to small businesses.

The amendment entitled "Expedited Resolution of Contract Administration Matters" requires several technical amendments to eliminate the phrase "contracting officer's decision," a term of art used in the Contracts Disputes Act. GSA would be pleased to assist your staff in drafting technical revisions that would eliminate confusion between the Contracts Disputes Act and the intent of the amendment.

Mr. Chairman, this concludes my prepared testimony. I would be pleased to respond to any questions that you or Committee members may have on GSA's position.





U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

MAY 23 1994

The Honorable Jan Meyers  
Ranking Minority  
Committee on Small Business  
United States House of Representatives  
Rayburn House Office Building  
Room 2361  
Washington, DC 20515

Subject: Report on Procurement Reform

Dear Congresswoman Meyers:

This is a report outlining the views of the Office of Advocacy on procurement reform.<sup>1</sup> It is prepared under the authority of 15 USC §634(f) and is intended to echo the concerns of the small business community. The Small Business Legislative Council, the National Small Business United, and the National Association for the Self-Employed agree with the opinions expressed herein.

Currently, Congress has before it a number of reform measures, including S.1587, H.R.2238, H.R.3586, H.R.4263 and H.R.4328. Small firms are the engine supporting economic growth as well as the driving force behind job creation and innovation in America. Congressional due diligence in considering these proposals must therefore acknowledge and support the needs of the small business community.

The Office of Advocacy strongly endorses acquisition reform. Few would disagree that our procurement system is too complex, absurdly slow and frequently ineffective. However, the zeal to reform must be tempered with adequate consideration for the concerns of the small business community. It took many years to instill sufficient checks and balances within the federal procurement process to encourage competition and increase opportunities for small, minority and women-owned firms. Some of these checks and balances are now seen as impediments to streamlining the procurement process.

It is important to note that many of the proposed legislative changes come from recommendations made by the

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<sup>1</sup> The views expressed in this document are solely those of the Chief Counsel for Advocacy and may not necessarily reflect the views of the U.S. Small Business Administration or the Administration.

Acquisition Law Advisory Panel (Section 800 panel). This panel was established by the 1991 National Defense Authorization Act (Public Law 101-510, Section 800) to review acquisition laws, with a goal of streamlining the Department of Defense acquisition process. Unfortunately, the small business community had minimal representation and input to the panel.

For reform to be meaningful and effective, it must be balanced equitably on all stakeholders. It would be a costly injustice, as well as an exercise in regression, if the small business community were to be sacrificed at the expense of less competition, higher government costs and fewer procurement opportunities for small firms.

We ask that you consider the following concerns in deliberations.

#### Simplified Acquisition Threshold

A critical component of the reform legislation focuses on increasing the small purchase threshold from \$25,000 to \$100,000. We support increasing the threshold if, and only if, specific measures are implemented to protect the small business community and enhance its ability to participate in federal procurement opportunities. These measures include:

Linking any increase in the small purchase threshold with a concurrent obligation to implement a coordinated government-wide electronic equivalent of the Commerce Business Daily.

While increasing the threshold will simplify the procurement process, it will hurt small firms if acquisition opportunities are not adequately publicized. If the threshold is increased without directly linking it to the implementation of an electronic commerce system, competition most likely would be minimized and many small firms would be precluded from participating in procurement opportunities. Reduced competition would increase the government's procurement costs.

We support the implementation of the federal acquisition computer network (FACNET) or similar government-wide electronic commerce system.

Maintaining the small business small purchase reserve for purchases of less than \$2,500.

Awards to small businesses, especially emerging firms, will be reduced if purchases of less than \$2,500 are not reserved. We agree that very small purchases should be easy to make and require minimal paperwork. Small firms can accommodate this need for greater simplicity.

For many small firms, very small purchases are the bread and butter of their operations. These same firms are often not able to compete for large federal acquisitions.

**Requiring detailed reporting under the Federal Procurement Data System for any purchase of \$10,000 or more.**

This requirement is necessary to measure and evaluate the results of increasing the threshold.

**Requiring the implementation of fast pay procedures in contracts awarded to small firms under the small purchase threshold.**

The Prompt Payment Act Amendments of 1988 give executive agencies authority to implement fast pay procedures for contracts under the small purchase threshold. However, implementing regulations have basically neutered this provision, allowing agencies to avoid compliance.

Fast pay provisions in contracts below the threshold would require small firms to be paid by agencies within 15 days from the receipt of an invoice and require the availability of payment through electronic transfer upon contractor performance. Fast pay procedures, enacted in the Amendments of 1988, should be mandated.

**Linking the threshold for small claims procedures to the simplified acquisition threshold.**

This would raise the current small claims threshold from \$10,000 to \$100,000, allowing access to simplified and more efficient claims procedures.

**Amending the Davis-Bacon Act, the Services Contract Act and the Miller Act.**

The Davis-Bacon Act requires contractors for federal and public works projects to pay workers the local prevailing wage rate, usually union wages. The act was intended to prevent construction companies offering substandard wages from underbidding local companies. The threshold for coverage under the act was set at \$2,000 in 1931 and remains the same today.

The Service Contract Act of 1965 has purposes for service contracts similar to those of the Davis-Bacon Act for construction. It applies to contracts in excess of \$2,500. It requires contractors to pay the minimum prevailing wage and specified fringe benefits.

The Miller Act requires that for any federal construction contract worth \$25,000 or more, the contractor must be bonded.

We urge that the threshold for these laws be increased to \$100,000 or the established level for Simplified Acquisition Threshold. Further, we urge that the Federal Acquisition Regulations be modified, with respect to the Miller Act, to provide alternative payment protections for small business subcontractors and suppliers.

#### Commercial Items

We support efforts to make it easier for firms to sell, and the government to buy, commercial products for government use. Reliance on commercial items is one of the identified purposes of the Competition in Contracting Act of 1984. We support a clear preference for the use of commercial items and performance specifications. However, aspects of the proposed legislation could be very damaging to small firms.

#### **Broad Definitions for Commercial Items**

Proposed definitions for commercial items are excessively broad. Not only do they include items that have been sold commercially, but they also include those which might (or might not) be sold commercially in the future. We are concerned that a firm could use its purported offer of a product to the general public, whether or not there is a commercial market, as a means of avoiding various statutory requirements. Further, some proposals would modify the definition of commercial items to include all forms of commercial services.

If the definition of commercial items were made excessively broad and specific statutory requirements eliminated as proposed, procurement opportunities for small firms would be significantly reduced.

#### **Preserve Subcontracting Plans for Subcontractors**

Proposed legislation would free subcontractors supplying commercial items or commercial components for government-designed products from any requirement to utilize small or small disadvantaged concerns as "second-tier" subcontractors and suppliers. We strongly oppose any effort to eliminate subcontracting plan requirements. Such changes in the law would have a significant adverse effect on the ability of small firms to participate in contract opportunities.

The current law requiring the flow-down of subcontracts to small firms has helped many small, minority and women-owned businesses.

We endorse recommendations of the small business community to make small business and small disadvantaged business participation at the subcontract level a criterion for the award of prime contracts.

#### **Market Acceptance**

It is proposed that new procedures for the acquisition of commercial items be developed. We support the development of procedures that provide consistent, government-wide implementation, as opposed to allowing individual agencies to establish their own definition for market acceptance.

Further, implementing regulations that will ultimately define "market acceptance criteria" must be sensitive to the needs and especially the limitations of the small business community. We are concerned that such criteria could be used to set standards beyond the reach of many small firms. For instance, if market acceptance criteria were used as a test for "responsiveness," some firms would be eliminated from competing, before having any recourse to SBA's Certificate of Competency (CoC) program.

The CoC program is a very successful government initiative that has helped many small firms. It would be counter productive to allow the development of procedures that could cancel the intended purpose of the CoC program.

#### **Pilot Programs**

We acknowledge the need for and the advantages of testing and implementing alternative procurement methods. However, we oppose efforts that would grant sweeping authority to specific federal agencies and eliminate long-standing statutory protections for small businesses.

#### **Test Authority**

It has been proposed that the Administrator for the Office of Federal Procurement policy (OFPP), in considering procurement pilot programs, be given authority to waive not only regulations, but also laws, by simply giving notice to the Congress. Waivers of statutes should not be so lightly undertaken, and we oppose such blanket authority granted to the Administrator of the OFPP.



If statutory waivers are deemed necessary to conduct a pilot program, specific Congressional approval should be obtained and OFPP should be required to obtain the concurrence of the agency or agencies responsible for the statutes to be waived or suspended.

#### **Defense Acquisition Pilot Program**

Proposals would give the Secretary of Defense authority to waive or limit the applicability of specific statutory requirements in implementing the Defense Acquisition Pilot Program. The proposed waivers include eliminating small business set-asides, the small business small purchase reserve, and small and small disadvantaged business subcontracting plans. We oppose these proposals.

The small business programs cited have been established as an integral part of the protections for small businesses. These programs assure those new to the federal procurement environment that opportunities will be made available to them. The gradual elimination of these protections not only removes specific opportunities from the table, but also sends a message that efficiency of administration and convenience of established relationships are more important than helping small firms to grow and participate in the federal procurement process.

#### **Extension of the DoD Minority Enterprise Development Program**

Proposals would extend to civilian agencies the minority enterprise development program currently authorized for DoD under 10 U.S.C. 2323 (formerly Section 1207 of Public Law 97-661, the National Defense Authorization Act for 1987). We recommend that the SBA play an integral role in the development and oversight of an extended Minority Enterprise Development Program.

#### **Contract Goals**

We support increasing the government-wide goal for participation by small business concerns from 20 percent to 25 percent of the total value of all prime contract awards for each fiscal year. Further, we support establishing a goal for the participation of women-owned businesses at 5 percent of the aggregate value of all prime contracts.

#### **Best-Value Contracting**

Best-value practices are intended to help government agencies receive the best overall value in contracts it awards. Under such practices, contracts are awarded by considering a combination of price and technical factors, with technical factors taking precedence. The concept removes the super-

preference for low-bid proposals and puts best-value negotiated solicitations on equal footing with sealed bid solicitations.

We support the intended purpose of best-value practices, but are concerned with the level of subjectivity such practices provide to contract officers in weighing individual evaluation factors. We recommend that any effort to broadly incorporate the use of best value practices include specific provisions that would clarify evaluation factors, specify weighing procedures and minimize subjectivity.

#### Truth in Negotiations Act

The Truth in Negotiations Act (TINA) requires contractors to submit cost or pricing data before the award of a contract or a contract modification that is expected to exceed \$500,000. Similar requirements are imposed on subcontractors, who must submit such data to the prime contractor. Current law stipulates that the \$500,000 threshold be reduced back to the 1984 level of \$100,000 after December 31, 1995. We support proposals to keep the TINA threshold at \$500,000.

#### Past Performance Practices

Proposals would alter regulations that require federal agencies to consider a contractor's past performance in awarding future contracts. We are concerned that such practices could impede the ability of small firms, especially minority and women-owned businesses, to obtain federal contracts. This is because most small firms have limited experience in the government market place.

We recommend that any provisions to consider past performance in the evaluation process include specific measures to consider both commercial and federal past performance; include recognition of a firm's compliance with its subcontracting obligations under Section 8(d) of the Small Business Act and clearly acknowledge that a company would not be penalized if no information regarding past experience was available.

#### Technical Data Rights

In addition to pending procurement reform legislation, Congress is considering recommendations prepared by the DoD/Industry Technical Data Advisory Committee (Section 807 committee).

The 807 committee is charged with preparing recommendations that will lead to the development of technical data regulations that are equitable to all federal contract participants in the creation and use of technical data. This is a powerful issue,

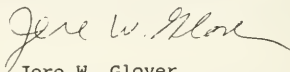
charged with controversy and fueled by different agendas. Although the committee sought consensus among divergent groups, its recommendations appear to side with the interests of predominantly large firms.

A key recommendation made by the committee is that data rights be determined based upon whether development is charged to DoD as a direct or indirect charge, rather than whether it is paid for by the DoD. In the interests of small business, greater competition and reduced government costs, we urge that all data paid for by the taxpayer be available for competitive purposes, irrespective of whether it is charged to the government as a direct or indirect cost. Further, we urge that careful consideration, as well as a comprehensive analysis of the projected impact on small manufacturers, be undertaken before technical data regulations are changed.

Procurement reform is desperately needed and should be vigorously pursued. We strongly endorse efforts to simplify and streamline the procurement process. However, reform must be equitable and not carried on the back of the small business community.

The Office of Advocacy shares the commitment of the Congress to make meaningful reform a reality and stands ready to work with it in that endeavor.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jere W. Glover". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Jere W. Glover  
Chief Counsel  
Office of Advocacy

*Kathleen T. Schwallie*

*Attorney at Law*

*777 South Figueroa Street, Suite 1000*

*Los Angeles, California 90017*

*Tel: (213) 896-5858 Fax: (213) 896-5500*

May 23, 1994

Congresswoman Jan Meyers  
B 343C Rayburn House Office Building  
Washington, D.C. 20515

Re: May 24, 1994 Hearing on H.R. 4263

Dear Congresswoman Jan Meyers

As you know, the Small Business Committee will be holding a hearing on proposed amendments to H.R. 4263 this Tuesday. We understand that Chairman La Falce has decided to only hear from representatives of the Administration, not any businesses that may be affected by these amendments, or their representative organizations. As I told Jim Marion of the Chairman's staff, we are disappointed in this decision. NAWBO would like to appear to support a government-wide 5% goal for procurement of supplies and services from women-owned businesses.

In enacting this economic development legislation we support, you will be increasing competition for government contracts, thus ensuring better value for the taxpayers. This amendment is necessitated by the fact that in 1993 only 1.8% of all government contracts were awarded to women-owned businesses. This statistic is grim, but when viewed in light of the 6.5 million women-owned businesses in this country employing more than the Fortune 500 corporations, it is deplorable. The Small Business Committee has documented the inequities faced by women-owned businesses in its own hearings. Women-owned businesses experience discrimination in obtaining access to capital, bonding, and corporate procurement, among other things. So while the growth in the number of women-owned firms is positive, we are seeing far too many of these businesses flounder due to their lack of opportunities.

In seeking the 5% goal, we support continued efforts by the Committee to encourage additional government procurement with minority-owned businesses. We seek a goal which is separate and distinct from all minority-owned business goals and set-asides to ensure no negation of their continued progress. Furthermore, we support a strengthened protest, and sanction process to alleviate front operations.

We are aware that vague concerns have been raised about the constitutional legitimacy of a goal for women-owned businesses. These are unwarranted. The Supreme Court in recent decisions concerning race-conscious measures has not even hinted that Congress would not have the constitutional power to establish such a goal. The Court has set out the following principles. First, the Court gives great deference to Congressionally-sponsored initiatives as compared to those sponsored by state governments. Second, programs encouraging more government contracting with particular groups that do not compensate victims of past government or societal discrimination are constitutionally permissible to the extent that they serve important governmental objectives and are substantially related to achieving those objectives.

We believe the government's objective should be to encourage increased procurement with women-owned businesses. The 5% goal would be substantially related to achieving this objective. This is true in large part because even though there are no major procurement programs exclusive to women-owned businesses, the majority of their procurement dollars flow from preference programs. The goal would be aimed directly at the barriers that women face in entering the federal procurement market.

It is also important to note that a goal is qualitatively different from the set-asides reviewed by the Supreme Court in recent years. The most important outcome being that the goal would impose only a slight burden on men-owned businesses, a crucial issue consistently identified by the Court. There are only a limited number of contracts awarded, and no one has a right to any specific award. In addition, the 5% goal would only concern only a small fraction of all government contracts. It is not a quota or fixed quantity set-aside, and men-owned businesses are free to compete for the vast remainder of government contracts.



We do recommend that the Committee limit the duration of the goal, and subject it to reassessment before renewal through hearings within two years. The Court has made clear actions such as these will help insulate it from legitimate attack. It should also be noted that the administrative and judicial review of the government contracting process provide guarantees that only responsive and responsible women-owned businesses are awarded these contracts.

Federal procurement is a significant vehicle for promoting and developing women-owned businesses. All we seek is to be allowed on the playing field, and given an opportunity to compete.

Administrator Bowles told representatives of NAWBO at a meeting last week he supports a 5% goal for women-owned businesses. We have been informed by the National Women's Business Council that a representative of the Small Business Administration will testify at the hearing in support of the goal.

I would be more than happy to discuss these issues with you or your staff. Please let us know your position on the proposed goal. We look forward to your support of this important amendment. Thank you for your continued leadership on issues of concern to women-owned businesses.

Very truly yours,

Kathleen T. Schwallie  
Chairperson  
National Association of Women  
Business Owners Legal Committee on  
Government Procurement

### Research Evidence and Explanations for the Pay Disparity Between Genders

The pay disparity between men and women in the U.S. labor market has been clearly demonstrated (Brown & Pechman, 1987; Diboye, 1987; Drazin & Auster, 1987; Kanter, 1977; Kessler-Harris, 1990; Korn/Ferry, 1982; National Center for Educational Statistics, 1992; Schmid & Reitzel, 1984; Thurow, 1969; U.S. Department of Labor, 1986; U. S. Office of Personnel Management, 1989; Von Glinow & Krzyckowska-Mercer, 1988).

Many explanations have been offered for these differences. However, even after controlling for many of these variables, a rather large pay disparity still exists. Truman and Hartman (1981) report that "the evidence suggests that only a small part of the earnings differences between men and women can be accounted for by differences in education, labor force experience, labor force commitment or other human capital factors to contribute to productivity differences among workers " (p.41). Schmid & Reitzel (1984) agree that " after controlling for these and other variables hypothesized to effect earnings, an unexplained residual remains" (p.85). Additionally, Thurow (1969) reports other forms of labor market discrimination against women including employment discrimination, higher rates of unemployment and part time employment.

Further, it has been found that U.S. employers have denied occupational opportunity on the basis of gender. As a result, the courts have decided that women were excluded from higher level or high paying jobs (EEOC, 1972, Osterman, 1978). More recently, Time Magazine (October 5, 1992) reported that a congressional subcommittee has published a report of White House salaries for 1991 which revealed that men were earning substantially

more than their female colleagues with the same job titles.

Morrison and Von Glinow (1990) have posited three theories for the residual differences between the pay of men and women in the U.S.. They are: differences in human capital, blatant discrimination and systematic bias. The first theory postulates that the pay differential occurs as a result of women's handicapping differences. According to this theory, women are not bringing the same human capital resources to the workplace.

#### Differences in Human Capital

This theory assumes that the same human capital investment would pay off equally for minority and majority groups. However, recent research has demonstrated that this is not the case. The U.S. Department of Education Office of Educational Research and Improvement recently completed a study using data collected from the National Longitudinal Study of the High School Class of 1972. This study consisted of surveys conducted in 1972, 1973, 1974, 1976, 1979 and 1986, high school records and test scores, and post-secondary records of all those in the sample of the Class of 1972 who attended college between 1972 and 1984. The report, titled *Women at Thirtysomething: Paradoxes of Attainment*, concluded that "women's educational achievements were superior to those of men, but that their rewards in the labor market were thin by comparison" (pg. V). According to the authors of this study, this suggests "a residual bias in the labor market" against women. Specifically, women outperformed men in high school, received more scholarships for post-secondary education, completed college degrees faster than men, and received higher grade point averages in college than men no matter what field they studied

(including statistics and calculus). However, between ages 25 and 32, a much higher percentage of women experienced genuine unemployment, no matter what degree they had earned.

### Blatant Discrimination

The second theory mentioned by Morrison and Von Glinow (1990) attributes blatant discrimination including bias and stereotyping as the reason for the disparity in pay. Rational bias " is a psychological theory that suggests that discrimination is influenced by contextual circumstances in which racial or gender bias results in career rewards or punishments" (Morrison & Von Ginow, 1990, p. 202). According to these authors, rational bias illustrates why discrimination can continue to occur despite substantial regulations against it. Several examples of rational bias follow.

Evidence for the equivalence of men and women managers with respect to managerial behavior was demonstrated by the Assessment Center Studies done by AT & T (Howard & Bray, 1988). However, a large majority of studies suggest that the deficiencies of women are presumed even when they do not exist. The "good" manager is still described as masculine.

Four personality traits which have been measured in studies of differences between male and female managers are dominance, responsibility, achievement and self-assurance. Having controlled for education and level in the organization, there are usually no differences between the genders (Brenner, 1982). However, many researchers have found that the perception still persists that women rank lower in the possession of qualities

important for managers (Dubno, 1985; Massengill and DiMarco, 1979; Rosen and Jerdee, 1978; Schein, 1973).

Female participation in the top executive ranks of large corporations remain small. Only a limited number of top executives are female (Brenner, Tomkiewicz & Schein, 1989). In addition, the corporate boards of Fortune 500 companies remain predominantly male (Dipboye, 1987). Additionally, "women fill nearly a third of all management positions (up from 19% in 1972) but most are stuck in jobs with little authority and relatively low pay" (Hymowitz & Schellhardt, 1986, p. 1 D). Further, according to the World Press Review (1992) women make up the majority of the voting population, but represent only 5.6% of the U.S. Congress. Only in 1992, when the number of women in the U.S. Senate has increased to six has a women's restroom in the Senate chambers been planned.

Eagly, Makhijani and Klonsky (1992) in their review of 61 empirical studies found a tendency towards rating female leaders less favorably than male leaders, especially when leadership carried out in stereotypical masculine styles and, particularly, when leadership was autocratic or directive. In addition, the devaluation of women leaders was greater when leaders occupied male-dominated roles and when the evaluators were men. The results of this study has implications for perceptions of women entrepreneurs selling their goods and services to the U.S. government.

Fiske, Bersoff, Borgida, Deau and Heilman (1991) have argued that gender stereotypes may cause the behavior of women to be interpreted differently than that male



colleagues. In their analysis of the litigation between Ann Hopkins and Price Waterhouse these authors argue that the very same behavior would have been viewed as acceptable and perhaps valued quite favorably had Ms. Hopkins been a male. Further, these authors state that "if people are biased to evaluate female leaders' efforts less favorably than those of their male counterparts, women who aspire to leadership roles would encounter very serious barriers to entering these roles and advancing to higher levels within organizations" (p 3). In fact, "the empirical literature addressing the issue of whether women are devalued in leadership roles is substantial" (ibid, p.3). Some examples of this devaluation follows.

A substantial amount of literature has accumulated to support the contention that people's expectations about managerial behavior depend to some extent on manager gender (Heilman, Block, Martell & Simon, 1989; Russell, Rush, & Herd, 1988). In fact, Gutek & Morasch (1982) have named this propensity for behavior expectations based on gender as "gender-role spillover".

Heilman et al. (1989) contend that this spillover has implications for the undervaluation of female leaders since leadership behavior is perceived as more masculine. Therefore, expectations of leadership behavior are more consistent with expectations of male than of female behavior. According to these authors, women's management behavior may be perceived as more dominating and controlling due to the fact that they are discrepant from people's perceptions of appropriate behavior for women.

Heilman et. al . (1989) concluded that women pay a price for intruding on male-dominated domains by either adopting male-stereotypical leadership styles or occupying

male-dominated leadership positions. This however, is a no-win situation if these women are then perceived negatively due to the perception that this management style is inappropriate for women. According to several researchers, the stereotypes are so strong that contrary data are sometimes ignored in managerial selection and other managerial decisions (Freedman & Phillips, 1988; Heilman & Martell, 1986; Ilgen & Young, 1986). It is concluded whether consciously or not, individuals contribute to the differential treatment of women in management.

Gregory (1990) reports that gender stereotyping has been shown to be very prevalent in the workplace resulting in serious effects upon a woman manager's ability to compete effectively with men in the organization. Further, Falkenberg & Rychel (1985) assert that the stereotyping of "woman as homemaker" results in them being perceived as not having the skills and abilities necessary to enter male-dominated or high status occupations.

Sexual harassment is another type of blatant discrimination encountered by women in the workplace. Gutek (1985) concludes, after analyzing data from a study of 1257 working people in LA county, that "sexual harassment is common and women are the most likely victims" (p.53). According to this researcher, sexual harassment may take the form of comments, gestures, leering, touching as well as dating or sex as a requisite of the job. Interestingly, it was found that well educated women were just as likely to be harassed as their less educated counterparts. Further, more educated women were more likely to be "occupationally vulnerable" since their careers may be more dependent on a particular job at a particular place. Additionally, highly educated women may be more affected by sexual

harassment since they are more likely to have higher expectations for being treated in a professional manner (Gutek, 1985).

According to the New York Times (Gross, 1992) sexual harassment complaints to the Equal Employment Opportunity Commission are up in the first half of the 1992 fiscal year by more than 50%. This has all occurred since the Clarence Thomas Supreme Court

confirmation hearings in which Professor Anita Hill reported sexual harassment by her boss, ironically while functioning as Director of the EEOC.

More recently, on June 30, 1992 female veterans told a U.S. Senate panel of that they were sexually abused by their fellow soldiers during their tour of duty for their country in the Persian Gulf. Additionally, they reported that complaints to superiors were generally ignored or dismissed as untrue. Further, veterans hospitals were found to be just as unresponsive. In the same panel, Senator Alan Cranston reported about a 1988 Pentagon survey of sexual abuse among active duty soldiers.

Another very public disclosure of sexual harassment among military personnel occurred during a convention of Navy pilots of the Tailhook Association. The Tailhook incident involved an assault on 26 women, including 14 female officers at last year's convention of naval aviators. This incident eventually led to the resignation of the Secretary of the Navy. Even the special prosecutor assigned to the Tailhook case was re-assigned due to his repeated attempts to date one of the victims of Tailhook. "Until Tailhook, we dealt too often with sexual harassment at the local level, one case at a time, rather than understanding it as a cultural issue" Admiral Frank B. Kelso 2nd, the Chief of Naval Operations, told a hearing of the House Armed Services Committee in July. (Schmitt, 1992). "A common thread running through the majority of interviews with aviators was "What's the big deal?" said a report by the Naval Inspector General's Office.

As found in the study by Gutek (1985), educated women are not exempt from such blatant discrimination. Dr. Frances K. Conley, a professor of neurosurgery at Stanford

Medical School resigned her position last spring to protest sexism in academic medicine. Due to the tremendous media exposure which resulted, Dr. Conley subsequently returned to Stanford to bring reform.

Dr. Carolyn Heilbrun, until recently, a tenured professor on the faculty of Columbia University's Department of English was interviewed concerning her decision to opt for early retirement. "When I was spoke up for women's issues, I was made to feel unwelcome in my own department, kept off crucial committees, ridiculed, ignored. Ironically, my name in the catalogue gave Columbia a reputation for encouraging feminist studies in modernism. Nothing could be further from the truth" (Matthews, 1992).

A survey of lawyers and judges in the United States Court of Appeals Ninth District found that female judges, lawyers and clients face a variety of discrimination problems. About 60% of the 900 women who practice law in Federal courts in the Ninth Circuit said they had been subjected to unwanted sexual advances or other forms of sexual harassment in the last five years. Six percent said they had been harassed by judges. Seven of the 34 female judges (21%) reported that they had heard male Federal judges make disparaging remarks about a lawyer's "presumed sexual orientation" when discussing her legal work. Thirty seven percent of the female lawyers said judges sometimes cut off presentations of women more abruptly than those of men, 33% had said they had seen judges address female lawyers less professionally than men. The report, by an eight member task force of judges, lawyers and researchers, is the first sex-bias study of any of the nation's courts. It is based on responses from 3500 lawyers and 232 federal judges.



Regardless of the increase in the number of sexual harassment complaints brought by women in the United States, many cases go unreported, especially in the military. A 1990 Pentagon study found that although over two thirds of U.S. servicewomen have been sexually harassed by male military personnel, few filed complaints. The social and professional costs were too high. (Smolowe, 1992)

All evidence cited above demonstrate the pervasive nature of discrimination and harassment women face in workplace. This treatment transcends occupational and educational levels and is more widespread than we can imagine considering the fact that many incidents go unreported.

### Systematic Bias

The third explanation offered by Morrison and Von Glinow (1990) for the pay differences between the genders is subtle, systematic bias against women. The "glass ceiling" is a term referring to a barrier "so subtle it is transparent, yet so strong that it prevents women and minorities from moving up in the management hierarchy " (Morrison and Von Glinow, 1990, p. 200).

Several theorists studying the gender pay differential have suggested that high unemployment among women may be as a result of systematic bias against women in the workplace. Since employers are forced to give equal pay for equal work, they may be unwilling to hire women to begin with (Horner, 1968; Henning & Jardim, 1986).

Loscocco, Robinson, Hall & Allen (1991) found that even among a group of successful small business owners, women generate lower sales volumes and derive less income than their male counterparts. They report that even successful women are not as well positioned as their male counterparts to take advantage of business opportunities because of structural disadvantage both within and outside of the business arena.

## II. LOW INCOME STATUS BECAUSE OF DISCRIMINATORY PRACTICES

Women have been leaving their corporate jobs in large numbers for many reasons including the "glass ceiling" (Morrison, White & Van Velsor, 1987), frustration with corporate politics, a desire for autonomy (Kaplan, 1988) and down-sizing and mid-management lay-offs. According to the U.S. Department of Commerce, the rate of increase in the numbers of female-owned businesses is three times higher than that of men (U.S. Department of Commerce, 1979). Further, between 1982 and 1987 the number of women owned businesses in the U.S. has more than doubled (U.S. Department of Commerce, 1987).

Since the Supreme Court decision in *City of Richmond v. Cronson*, state and local governments were barred from giving preferential treatment to women and minority-owned

firms without evidence of discrimination. In recent months, both New York City and New York State have studied the share of government contracts awarded to women and minority firms in relation to their total numbers across the city and state. Both studies concluded that a pattern of discrimination exists in the procurement process. While the number of qualified minority and women owned firms totals 25% of city and state businesses, they receive only 8% of government contracts.

### Business Financing

In their study of Female Entrepreneurs, Pellegrino and Reece (1982) found that 25% of respondents reported discrimination in obtaining funds as a problem in starting and expanding their businesses. Hisrich and O'Brien (1982) also cited discrimination as an obstacle. According to these authors because women rely so heavily on bank loans for business financing, these biases are a serious problem.

"A common barrier for women entrepreneurs attempting to secure loans for their businesses is the perception that entrepreneurship requires characteristics attributed to men, but not to women" (Buttner & Rosen, 1988a, p. 91-92). Loan officers rated men significantly higher than women on six of the nine dimensions, among them leadership, autonomy, risk-taking, readiness for change, endurance, and low need for support. These authors found that women were never rated as close to "successful entrepreneurs" than were men on the nine dimensions of interest. In his review, Hisrich (1986) concluded that women in non-traditional businesses have limited opportunities .

### Conclusion

Based upon the wealth of evidence presented above, it is clear that:

- Women are economically and socially undervalued in the workplace.
- Discrimination against women in the workplace can be attributed to several factors, many of which work on an unconscious level and are culturally implanted in all of our perceptions.

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# Department of Justice

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STATEMENT OF

DEVAL PATRICK

ASSISTANT ATTORNEY GENERAL

CIVIL RIGHTS DIVISION

BEFORE THE

COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

THE SMALL BUSINESS AND MINORITY SMALL BUSINESS

PROCUREMENT OPPORTUNITIES ACT OF 1994

H.R. 4263

PRESENTED ON



Mr. Chairman and Members of the Committee:

Thank you for providing me the opportunity to testify before the Committee to address the constitutional basis for amendments designed to enhance opportunities for individuals in federal procurement.

The Administration believes that there is a solid constitutional basis for enacting legislation that would provide a preference in federal procurement for small businesses owned by women. There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination that has been documented by Congress, in legal opinions, scholarly journals, and history books. See Hearings on Federal Contracting Opportunities for Minority and Women-Owned Business: An examination of the 8(d) Subcontracting Program before the Committee on Small Business, United States Senate, 98th Cong., 1st Sess. (Dec. 19-23, 1983); Hearings on Women Entrepreneurs: Their Success and Problems before the Committee on Small Business, United States Senate, 98th Cong., 2d Sess. (May 30, 1984).

Just this past term, in J.E.B. v. Alabama, a case in which the Supreme Court held that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, it noted the similarities between racial and gender discrimination. As the Court stated, "while the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those

differences.'" Quoting, from its landmark decision in Frontiero v. Richardson, 411 U.S. 667, 685 (1973), the Court explained:

Throughout much of the 19th century the position of women in our society, was in many respects comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property and to serve as legal guardians of their own children. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right -- which is itself preservative of other basic civil and political rights' -- until adoption of the Nineteenth Amendment half a century later."

While the position of women in our society has markedly improved over the past several decades, it is well-documented that women still face pervasive discrimination, both overt and subtle, in various arenas including the workplace, the job market, educational institutions, political forums, and the business world generally.

Congress, however, has broad remedial power pursuant to Section 5 of the Fourteenth Amendment, the Commerce Clause, and the Spending Power to eradicate such discrimination. Just as in the area of racial discrimination, Congress, consistent with Supreme Court precedent, can employ gender-conscious remedies,

including the numerical goals proposed in this context to remedy the effects of discrimination against women. Indeed, Congress's powers under the Constitution give it greater authority than other governmental bodies -- including states and localities -- to address the effects of past discrimination.

In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Supreme Court upheld a set-aside requiring that, absent an administrative waiver, 10% of funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minorities. More recently in Metro Broadcasting v. FCC, 497 U.S. 547 (1990), the Supreme Court sustained the constitutionality of two congressionally mandated minority preference programs and articulated the standard for reviewing the constitutionality of such federal remedial legislation. The Court held that benign racial classifications mandated by Congress are constitutional if "they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives." Metro Broadcasting, 497 U.S. at 565; See Fullilove, 448 U.S. at 473 (Burger, C.J.); id. at 498 (Powell, J., concurring); City of Richmond v. Croson, 488 U.S. 469, 487 489 (1989) (O'Connor, J.). As Chief Justice Burger wrote in Fullilove, 448 U.S. at 482, 472, Congress need not "act in a wholly color-blind fashion" when seeking to avoid the discriminatory use of federal funds and its remedial preferences are entitled to "appropriate deference" as a "co-equal branch" with the courts when enforcing equal protection

guarantees.

The Supreme Court has traditionally applied a similar middle level of scrutiny to classifications based on gender. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190 (1976). See also Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1982). Congress's authority to enact benign remedial measures is derived from Section 5 of the Fourteenth Amendment, its Spending Power, and the Commerce Clause. See Fullilove, 448 U.S. at 472; Metro Broadcasting, Inc. v. FCC, 497 U.S. at 563. As the Court explained in Fullilove, 448 U.S. at 476, Section 5 provides Congress with the power "to enforce by appropriate legislation, the equal protection guarantees of the Fourteenth Amendment. \* \* \* Correctly viewed, Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."

In addition, the Spending Power, Art. I, Section 8, Cl. 1, frequently has been employed to further broad policy objectives by conditioning receipt of federal funds on compliance with federal directives. Fullilove, 448 U.S. at 474; Metro Broadcasting, 497 U.S. at 563; Lau v. Nichols, 414 U.S. 563 (1974); Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947). See 42 U.S.C. 2000d (prohibition on discrimination by recipients of federal financial assistance). The Court relied on that power to justify the racial preference in Fullilove and explained,

"[t]he reach of the Spending Power, \* \* \* is at least as broad as the regulatory powers of Congress. If, pursuant to its regulatory powers, Congress could have achieved the objectives of the MBE program, then it may do so under the Spending Power." 448 U.S. at 475.

Congress can also draw from its powers under the Commerce Clause to eradicate discrimination in this context. See Metro Broadcasting, 497 U.S. at 563; Fullilove, 448 U.S. at 475-476; Heart of Atlanta Motel v. United States, 379 U.S. 251, 251 (1964); Katzenbach v. McClung, 379 U.S. 294, 302 (1964). Indeed, it has often turned to the Commerce Clause to remedy discrimination, such as in enacting Titles II and VII of the Civil Rights Act of 1964, which prohibit discrimination in public accommodations and employment, respectively. Moreover, in Fullilove, 448 U.S. at 475, the Court determined that Congress's authority under the Commerce Clause extends to the "regulat[ion] [of] prime contractors on federally funded public works projects." "Insofar as the MBE program pertains to the actions of private contractors, \* \* \* Congress could have achieved its objectives under the Commerce Clause." Id. at 476. See Metro Broadcasting, 497 U.S. at 563. Accordingly, the Constitution provides Congress with ample authority to enact a goal for women-owned businesses in public contracting.

To achieve that end, however, Congress must take care to ensure that the legislative record establishes a basis for the remedial preference. It "may legislate without compiling the



kind of 'record' appropriate with respect to judicial or administrative proceedings" and "need not make specific findings of discrimination." Fullilove, 448 U.S. at 478, 489; Metro Broadcasting, 497 U.S. at 565. See Fullilove, 448 U.S. at 502 (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law"); id. at 520 n.4 (Marshall, J. concurring in judgment); Croson, 488 U.S. at 490 (O'Connor, J. plurality) ("Congress may identify and redress the effects of society-wide discrimination"); California Federal S & L Ass'n v. Guerra, 479 U.S. 272, 285-286 (1987). See also Drew S. Days, III, "Fullilove," 96 Yale L.J. 453 (1987). Nonetheless, it is helpful for the legislative record to demonstrate the reasonableness of Congress's determination that remedial measures are necessary. That can be accomplished by introducing statistical data establishing a marked disparity in the percentage of public contracts awarded to businesses owned by women and an underrepresentation of businesses owned by women generally, anecdotal testimony demonstrating a history of discrimination against women in the contracting industry, as well as expert testimony suggesting a need to increase business opportunities for women. The record, of course, may draw on prior factfinding by Congress in this area.

Moreover, while particularized findings are not required, such findings are useful to substantiate the need for the preference. At a minimum, the record must contain sufficient

information to establish that past discrimination has denied businesses owned by women participation in public contracting opportunities and that "traditional procurement practices when applied to [those businesses], could [have] perpetuated the effects of prior discrimination." Fullilove, 448 U.S. at 478.

In enacting remedial preferences in favor of businesses owned by women, Congress need not specify the percentage goal that should be achieved. So long as Congress establishes the need for a preferential goal and delegates to the proper agency the authority to set the appropriate percentage goal, the legislation is permissible. See Adarand Constructors, Inc. v. Peña, F.3d (10th Cir. 1994). After all, "[w]hen Congress explicitly or implicitly delegates to agencies the power to elucidate a specific provision of a statute, the resulting agency action is entitled to deference." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984). See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 543 (1978); Udall v. Tallman, 380 U.S. 1, 16 (1965).

In accordance with Supreme Court precedent, the preference must be "narrowly tailored" to be constitutional. To satisfy this requirement, the percentage goal should be tied to availability of businesses owned by women in the market and an exemption should exist when qualified women contractors cannot be found at a reasonable price. See Fullilove, 448 U.S. at 488. It would also be advisable to have the preference extend for a

limited duration and be subject to periodic congressional review during its existence.

Thus far, I have focused exclusively on providing a preference to small businesses owned by women. I do not intend to exclude businesses owned by persons with disabilities from the discussion. Similar legal analysis can be applied to enhance the public contracting opportunities available to businesses owned by persons with disabilities.

I also want to comment briefly on proposed amendments relating to historically black colleges and universities. Congress previously has found that the federal government has discriminated in funding with regard to these institutions. See 20 U.S.C. 1060, et seq. Congress has clear authority to correct the effects of this history of discrimination.

We understand there is also a proposal to include specifically minority owned media in the 5% goal for the "socially disadvantaged persons" program. In Metro Broadcasting v. FCC, the Court approved preferential treatment for minorities in broadcast ownership as a means of promoting program diversity. Obviously, any such program must be structured with special sensitivity to the First Amendment.

Finally, I understand there is a proposal to exempt small businesses owned by socially disadvantaged persons from the requirement of economic disadvantage. Any such proposal would have to be scrutinized carefully for the obvious reason that the economic disadvantage requirement serves as a safeguard to ensure

that preferences benefit those most in need of them.

Thank you for the opportunity to present these views to the Committee.

103D CONGRESS  
2D SESSION

# H. R. 4263

[Report No. 103-606, Part I]

To promote the participation of small business enterprises, including minority small businesses, in Federal procurement and Government contracts, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 20, 1994

Mr. LAFALCE introduced the following bill; which was referred to the Committee on Small Business

JULY 14, 1994

Reported with an amendment and referred to the Committee on Government Operations for a period ending not later than August 5, 1994, for consideration of such provisions contained in the bill and amendment as fall within the jurisdiction of that committee pursuant to clause 1(j), rule X

[Strike out all after the enacting clause and insert the part printed in *italic*]

AUGUST 3, 1994

Referral to the Committee on Government Operations extended for a period ending not later than August 12, 1994

AUGUST 12, 1994

Additional sponsor: Ms. BROWN of Florida

AUGUST 12, 1994

The Committee on Government Operations discharged; referred to the Committee of the Whole House on the State of the Union

[For text of introduced bill, see copy of bill as introduced on April 20, 1994]

## A BILL

To promote the participation of small business enterprises, including minority small businesses, in Federal procurement and Government contracts, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4       *This Act may be cited as the “Small Business and Mi-*  
5 *nority Small Business Procurement Opportunities Act of*  
6 *1994”.*

7 **SEC. 2. FUNCTIONS OF SMALL BUSINESS ADMINISTRATION.**

8       *The Small Business Act (15 U.S.C. 631 et seq.) is*  
9 *amended by inserting before section 30 the following:*

10       *“SEC. 29. The Administrator of the Small Business*  
11 *Administration, in coordination with other Federal agen-*  
12 *cies, shall—*

13               *“(1) develop plans to coordinate and promote the*  
14 *use of the Federal Acquisition Computer Network by*  
15 *small businesses that incorporate outreach efforts by*  
16 *the Administration, agency Offices of Small and Dis-*  
17 *advantaged Business Utilization, Small Business De-*  
18 *velopment Centers, and other appropriate organiza-*  
19 *tions;*



1           “(2) inform and provide consistent and com-  
2       prehensive training on the Federal Acquisition Com-  
3       puter Network for small businesses; and

4           “(3) provide Minority Business Development  
5       Centers and other minority business assistance pro-  
6       grams of the Department of Commerce information  
7       on procurement opportunities and access to the Fed-  
8       eral Acquisition Computer Network.”.

9   **SEC. 3. SMALL BUSINESS RESERVATION.**

10       Section 15(j) of the Small Business Act (15 U.S.C.  
11   644(j)) is amended to read as follows:

12       “(j)(1) Each contract for the procurement of goods and  
13   services that has an anticipated value not in excess of  
14   \$100,000 or the simplified acquisition threshold, whichever  
15   is higher, shall be reserved exclusively for small business  
16   concerns unless the contracting officer is unable to obtain  
17   offers from 2 or more small business concerns that (A) are  
18   competitive with market prices, and (B) are competitive  
19   with regard to the quality and delivery of the goods or serv-  
20   ices being procured.

21       “(2) In carrying out paragraph (1), a contracting offi-  
22   cer shall consider any effort that is responsive and that is  
23   received in a timely manner from an eligible small business  
24   offeror.

1       “(3) Nothing in paragraph (1) shall be construed as  
2 precluding an award of a contract with a value not in ex-  
3 cess of \$100,000 under the authority of—

4               “(A) section 8(a) of this Act;

5               “(B) section 2323 of title 10, United States Code;

6               “(C) subsection (g) of this section; or

7               “(D) section 12 of the Business Opportunity De-  
8 velopment Reform Act of 1988.

9       “(4) A purchase by an executive agency with an an-  
10 ticipated value of the micropurchase threshold or less shall  
11 not be subject to the small business reserve requirements of  
12 paragraph (1).”.

#### 13 **SEC. 4. TECHNICAL AND CONFORMING CHANGES.**

14       (a) **SIMPLIFIED ACQUISITION THRESHOLD DE-**  
15 **FINED.**—Section 3(m) of the Small Business Act (15 U.S.C.  
16 632(m)) is amended to read as follows:

17               “(m) For purposes of this Act, the term ‘simplified ac-  
18 quisition threshold’ has the meaning given such term in sec-  
19 tion 4A of the Office of Federal Procurement Policy Act and  
20 the term ‘micro-purchase threshold’ has the meaning given  
21 such term in section 4B(e) of such Act.”.

22       (b) **CONFORMING AMENDMENT.**—Section 8(d)(2)(A) of  
23 the Small Business Act (15 U.S.C. 637(d)(2)(A)) is amend-  
24 ed by striking “does not exceed the small purchase thresh-

1 old” and inserting “is for an amount not in excess of the  
2 simplified acquisition threshold”.

3 **SEC. 5. CONTRACT GOALS FOR SMALL BUSINESSES OWNED**  
4 **BY SOCIALLY DISADVANTAGED INDIVIDUALS**  
5 **AND BY WOMEN.**

6 Section 15(g) of the Small Business Act (15 U.S.C.  
7 644(g)) is amended to read as follows:

8 “(g)(1) In order to carry out the small business objec-  
9 tives and findings set forth in section 2(a) of this Act, and  
10 in order to help remedy the past discrimination against  
11 businesses owned and controlled by socially disadvantaged  
12 individuals as set forth in the congressional findings in sec-  
13 tion 2(f) of this Act, and in order to help remedy the past  
14 discrimination against businesses owned and controlled by  
15 women as set forth in the congressional findings in section  
16 2(h) of this Act, the President annually shall establish Gov-  
17 ernment-wide goals, which shall not be interpreted as  
18 quotas, for procurement contracts awarded to small business  
19 concerns, small business concerns owned and controlled by  
20 socially disadvantaged individuals, and small business con-  
21 cerns owned and controlled by women. The Government-  
22 wide goal for participation by small business concerns shall  
23 be established at not less than 25 percent of the total value  
24 of all prime contract awards for each fiscal year. The Gov-  
25 ernment-wide goal for participation by small business con-

cerns owned and controlled by socially disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. Individual agency small business and women-owned small business goals shall be negotiated annually between each agency and the Administration.

“(2) A goal of not less than 5 percent of the amount described in paragraph (4) shall be established by each executive agency in each of fiscal years 1994 through 2000 for the total combined amount obligated for contracts, including any agency contracts for such things as travel services and food services which do not directly involve appropriated or obligated funds but from which the agency derives benefit, and subcontracts entered into with small business concerns owned and controlled by socially disadvantaged individuals, the majority of the earnings of which directly accrue to such individuals.

“(3) The Administrator for Federal Procurement Policy, in consultation with the Administration, shall provide procedures or guidelines for contracting officers to set goals which executive agency prime contractors that are required

1 to submit subcontracting plans under section 8(d) in fur-  
2 therance of the agency's program to meet the 5 percent goal  
3 specified in paragraph (2) should meet in awarding sub-  
4 contracts to entities described in that paragraph.

5       “(4) The requirements of paragraphs (2) and (3) for  
6 any fiscal year apply to the total value of all prime contract  
7 awards entered into by the executive agency for such fiscal  
8 year.

9       “(5)(A) To attain the goal specified in paragraph (2),  
10 the head of the agency shall provide technical assistance to  
11 the entities described in that paragraph.

12       “(B) Technical assistance provided under this section  
13 shall include information about the program, advice about  
14 the agency's procurement procedures, instruction in prepa-  
15 ration of proposals, and such other assistance as the agency  
16 head considers appropriate. If the resources of the executive  
17 agency are inadequate to provide such assistance, the agen-  
18 cy head may enter into contracts with minority private sec-  
19 tor entities with experience and expertise in the design, de-  
20 velopment, and delivery of technical assistance services to  
21 eligible individuals, business firms and institutions, acqui-  
22 sition agencies, and prime contractors. Agency contracts  
23 with such entities shall be awarded annually based upon,  
24 among other things, the number of minority small business  
25 concerns that each such entity brings into the program.

1       “(6) To attain the goal of paragraph (2):

2       “(A) The head of the agency shall—

3               “(i) ensure that substantial progress is  
4               made in increasing awards of agency contracts  
5               to entities described in paragraph (2);

6               “(ii) exercise his or her authority, resource-  
7               fulness, and diligence; and

8               “(iii) actively monitor and assess the  
9               progress of prime contractors of the agency in at-  
10              taining such goal.

11       “(B) In making the assessment under subpara-  
12       graph (A)(iii), the agency head shall evaluate the ex-  
13       tent to which use of the authority provided by sub-  
14       paragraphs (C) and (D) and compliance with the re-  
15       quirement of subparagraph (E) is effective for facili-  
16       tating the attainment of the goal described in para-  
17       graph (2).

18       “(C) To the extent practicable, and when nec-  
19       essary to facilitate achievement of the goal described  
20       in paragraph (2), the agency head shall make ad-  
21       vance payments under section 305 of the Federal  
22       Property and Administrative Services Act of 1949 to  
23       contractors described in paragraph (2) of this sub-  
24       section. The Federal Acquisition Regulation shall pro-  
25       vide guidance to contracting officers for making ad-



1        *vance payments to entities described in subsection*  
2        *(a)(1) of this section under section 305 of the Federal*  
3        *Property and Administrative Services Act of 1949.*

4                *“(D) To the extent practicable and when nec-*  
5        *essary to facilitate achievement of the goal described*  
6        *in paragraph (2), the agency head may enter into*  
7        *contracts using less than full and open competitive*  
8        *procedures (including awards under section 8(a)) and*  
9        *partial set asides for entities described in paragraph*  
10        *(2), but shall, except when using competition open*  
11        *only to small businesses, pay a price not exceeding*  
12        *fair market cost by more than 10 percent in payment*  
13        *per contract to contractors or subcontractors described*  
14        *in paragraph (2). The agency head shall adjust the*  
15        *percentage specified in the preceding sentence for any*  
16        *industry category if available information clearly in-*  
17        *dicates that nondisadvantaged small business con-*  
18        *cerns in such industry category are generally being*  
19        *denied a reasonable opportunity to compete for con-*  
20        *tracts because of the use of that percentage in the ap-*  
21        *plication of this paragraph.*

22                *“(E) To the extent practicable, the agency head*  
23        *shall maximize the number of socially disadvantaged*  
24        *small business concerns participating in the program.*

1           “(F) The Administrator for Federal Procurement  
2       Policy, in consultation with the Administration, shall  
3       prescribe regulations which provide for the following:

4           “(i) Procedures or guidance for contracting  
5       officers to provide incentives for prime contrac-  
6       tors described in paragraph (2) to increase sub-  
7       contractor awards to entities described in such  
8       paragraph.

9           “(ii) A requirement that contracting officers  
10      emphasize the award of contracts to entities de-  
11      scribed in paragraph (2) in all industry cat-  
12      egories, including those categories in which such  
13      entities have not traditionally dominated.

14          “(iii) Guidance to executive agency person-  
15      nel on the relationship among the following pro-  
16      grams:

17          “(I) The program implementing this  
18      subsection.

19          “(II) The program established under  
20      section 8(a).

21          “(III) The small business set-aside pro-  
22      gram established under subsection (a).

23          “(iv) With respect to an agency procure-  
24      ment which is reasonably likely to be set aside  
25      for entities described in paragraph (2), a re-

quirement that, to the maximum extent practicable, the procurement be designated as such a set-aside before the solicitation for the procurement is issued.

“(v) Policies and procedures that, to the maximum extent practicable, will ensure that current levels in the number or dollar value of contracts awarded under the program established under section 8(a) and under the small business set-aside program established under subsection (a) of this section are maintained and that every effort is made to provide new opportunities for contract awards to eligible entities, in order to meet the goal of paragraph (2) of this subsection.

“(vi) Implementation of this section in a manner which will not alter the procurement process under the program established under section 8(a).

“(vii) A requirement that one factor used in evaluating the performance of a contracting officer will be the ability of the officer to increase contract awards to entities described in paragraph (2).

“(viii) Increased technical assistance to entities described in paragraph (2).

1       “(7)(A) Whoever for the purpose of securing a contract  
2 or subcontract under paragraph (2), misrepresents the sta-  
3 tus of any concern or person as a small business concern  
4 owned and controlled by socially disadvantaged individuals  
5 (as described in paragraph (2)) shall be punished by im-  
6 prisonment for not more than 1 year or a fine of not less  
7 than \$10,000, or both.

8       “(B) The Federal Acquisition Regulation shall pro-  
9 hibit awarding a contract under this section to an entity  
10 described in paragraph (2) unless the entity agrees to com-  
11 ply with the requirements of subsection (o)(1).

12       “(8)(A) To the maximum extent practicable, the head  
13 of the agency shall—

14               “(i) ensure that no particular industry category  
15 bears a disproportionate share of the contracts award-  
16 ed to attain the goal established by paragraph (2);  
17 and

18               “(ii) ensure that contracts awarded to attain the  
19 goal established by paragraph (2) are made across the  
20 broadest possible range of industry categories.

21       “(B) Under procedures prescribed by the head of the  
22 agency in consultation with the Administration, a person  
23 may request the agency head to determine whether the use  
24 of small disadvantaged business set-asides by a contract ac-  
25 tivity of the agency has caused a particular industry cat-

1 egory to bear a disproportionate share of the contracts  
2 awarded to attain the goal established for that contracting  
3 activity for the purposes of this subsection. Upon making  
4 a determination that a particular industry category is  
5 bearing a disproportionate share, the agency head shall take  
6 appropriate actions to limit the contracting activity's use  
7 of set-asides in awarding contracts in that particular in-  
8 dustry category and to increase the contracting activity's  
9 use of set-asides in awarding contracts in other industry  
10 categories.

11       “(9)(A) The Administrator for Federal Procurement  
12 Policy, in consultation with the Administration, shall issue  
13 regulations to ensure that potential contractors submitting  
14 sealed bids or competitive proposals to the executive agency  
15 for procurement contracts to be awarded under the program  
16 provided for by this subsection are complying with applica-  
17 ble subcontracting plan requirements of section 8(d).

18       “(B) The regulations required by subparagraph (A)  
19 shall ensure that, with respect to a sealed bid or competitive  
20 proposal for which the bidder or offeror is required to nego-  
21 tiate or submit a subcontracting plan under section 8(d),  
22 the contracting plan shall be a factor in evaluating the bid  
23 or proposal.

24       “(10)(A) Not later than December 15 of each year, the  
25 Administration shall submit to Congress a report on the

1 progress of each executive agency toward attaining the goal  
2 of paragraph (2) during the preceding fiscal year.

3 “(B) The report required under subparagraph (A)  
4 shall include a description of—

5 “(i) the degree of participation by small business  
6 concerns owned and controlled by socially disadvan-  
7 taged individuals in procurements conducted by each  
8 executive agency, including information concerning  
9 the race and gender of such individuals; and

10 “(ii) the extent of compliance by executive agen-  
11 cies with the goals for participation by such business  
12 concerns required by paragraph (1), relating to Gov-  
13 ernment-wide small business, small disadvantaged  
14 business, and women-owned small business goals for  
15 procurement contracts.

16 “(11) This subsection shall not be construed as modify-  
17 ing or superseding any other provision of law establishing  
18 the program under section 2323 of title 10, United States  
19 Code, or a goal or requirement for an agency to obligate  
20 5 percent, or more than 5 percent, of the total value of all  
21 prime contract awards entered into by the agency for a fis-  
22 cal year with any entity described in paragraph (2).

23 “(12) For the purposes of this subsection, an individ-  
24 ual shall be considered to be socially disadvantaged if the  
25 individual has a physical or mental impairment that—



1           “(A) substantially limits one or more of the  
2           major life activities of the individual; and

3           “(B) has been found by the Administration to re-  
4           sult in a socially disadvantaged status for the class  
5           of individuals having such impairment.

6           “(13)(A) Not later than 1 year after the date of the  
7           enactment of this paragraph, the Administration shall issue  
8           regulations to make uniform the procedure by which a small  
9           business concern may qualify as a small business concern  
10          owned and controlled by socially disadvantaged individuals  
11          for the purposes of this subsection.

12          “(B) Regulations to be issued pursuant to subpara-  
13          graph (A) shall provide, at a minimum, for the following:

14               “(i) Specification of the requirements for quali-  
15               fying as a small business concern owned and con-  
16               trolled by socially disadvantaged individuals for the  
17               purposes of this subsection.

18               “(ii) Establishment of a uniform procedure to be  
19               applied by each executive agency in the certification  
20               of small business concerns meeting the requirements  
21               specified pursuant to clause (i).

22          “(C) For the purposes of this subsection, an executive  
23          agency may not require a small business concern for which  
24          a certification issued by another executive agency pursuant  
25          to subparagraph (B)(i) is in effect to make any additional

1 *showing that the small business concern qualifies as a small*  
 2 *business concern owned and controlled by socially disadvan-*  
 3 *tagged individuals.*

4       “(14) This subsection shall not be construed as modify-  
 5 *ing or superseding eligibility requirements for participa-*  
 6 *tion in any other program established by this Act.*

7       “(15) This subsection applies to each of fiscal years  
 8 *1994 through 2000.”.*

9 **SEC. 6. ENCOURAGEMENT OF INNOVATIVE PAYMENT METH-**  
 10 **ODS.**

11       Section 15(k)(5) of the Small Business Act (15 U.S.C.  
 12 644(k)(5)) is amended by striking the semicolon at the end  
 13 and inserting the following: “, and encourage procurement  
 14 officials to implement innovative payment methods, includ-  
 15 ing, but not limited to, advance payments or payments for  
 16 mobilization costs, in the award or negotiation of contracts  
 17 to small business concerns,”.

18 **SEC. 7. MAINTAINING SMALL BUSINESS ACCESS TO CON-**  
 19 **TRACTING OPPORTUNITIES.**

20       Section 8 of the Small Business Act (15 U.S.C. 637)  
 21 *is amended—*

22               (1) in subsection (e)(1)(A), by striking “the  
 23 *small purchase threshold*” each place it appears and  
 24 *inserting “\$25,000”;*

1           (2) in subsection (g)(1), by redesignating sub-  
2       paragraphs (A), (B), (C), (D), and (E) as subpara-  
3       graphs (B), (C), (D), (E), and (F), respectively, and  
4       by inserting before subparagraph (B), as so redesign-  
5       ated, the following:

6           “(A) the proposed procurement is conducted by  
7       means of electronic commerce under the Federal Ac-  
8       quisition Computer Network System established pur-  
9       suant to the Office of Federal Procurement Policy  
10      Act;”;

11          (3) in subsection (e)(1)(B), by striking “(B)”  
12      and all that follows before clause (i) and inserting the  
13      following:

14          “(B) an executive agency soliciting offers for the  
15      purchase of property or services shall post in a public  
16      place at the contracting office a notice of the contract-  
17      ing opportunity (meeting the standards of subsection  
18      (f)) and receive offers in response to such notice for  
19      a period of not less than 10 days—”; and

20          (4) in subsection (e), by adding at the end the  
21      following:

22          “(4) Whenever an executive agency conducts a procure-  
23      ment by means of electronic commerce under the Federal  
24      Acquisition Computer Network System established pursu-  
25      ant to the Office of Federal Procurement Policy Act, the

1 *solicitation of offers shall prescribe a deadline for the sub-*  
2 *mission of offers that—*

3           “(A) *in the case of a solicitation to furnish a*  
4 *commercial item, is not less than 5 days;*

5           “(B) *in the case of a solicitation to furnish any*  
6 *other type of product, is not less than 10 days;*

7           “(C) *in the case of a solicitation to furnish advi-*  
8 *sory and assistance services, is not less than 20 days;*  
9 *and*

10           “(D) *in the case of solicitation to furnish any*  
11 *other type of service, is not less than 15 days.”.*

12 **SEC. 8. SIMPLIFIED ACQUISITION THRESHOLD.**

13       (a) **MEASURING EFFECT ON SMALL BUSINESS PAR-**  
14 **TICIPATION.**—*Until October 1, 1999, procuring activities*  
15 *shall report procurement awards with a dollar value of at*  
16 *least \$10,000, but less than \$100,000, in conformity with*  
17 *the procedures or the reporting of a contract award in excess*  
18 *of \$25,000 that were in effect on October 1, 1992.*

19       (b) **FAST PAYMENT PROCEDURES.**—

20           (1) **RESPONSIBILITIES OF THE ADMINIS-**  
21 **TRATOR.**—*The Administrator of the Small Business*  
22 *Administration shall propose a modification to the*  
23 *Federal Acquisition Regulation that provides for the*  
24 *use of the payments terms described in paragraph (2),*

1       and for the disbursement of payment through elec-  
2       tronic fund transfer, whenever circumstance permits.

3       (2) *REQUIRED PAYMENT TERMS.*—Unless miti-  
4       gating circumstances preclude, the payment terms for  
5       a purchase or classes of purchases made pursuant to  
6       simplified acquisition procedures shall require pay-  
7       ment, in accordance with the provisions of chapter 39  
8       of title 31, United States Code, not later than 15 days  
9       after the date of receipt of a proper invoice for prod-  
10      ucts delivered or services performed if—

11               (A) in the case of a purchase of property,  
12              title to the property will vest in the Government  
13              upon delivery of the property to the Government  
14              or to a common carrier; and

15               (B) in the case of property or services for  
16              which payment is due before the Government's  
17              acceptance of the property or services, the vendor  
18              provides commercial or other appropriate war-  
19              ranties assuring that the property or services  
20              purchased conform to the requirements set forth  
21              in the Government's purchase offer.

1 **SEC. 9. EXPEDITED RESOLUTION OF CONTRACT ADMINIS-**  
2 **TRATION MATTERS.**

3 (a) *REGULATIONS REQUIRED.*—The Federal Acquisi-  
4 tion Regulation shall include provisions that require a con-  
5 tracting officer—

6 (1) to make every reasonable effort to respond in  
7 writing within 30 days to any written request to a  
8 matter relating to the administration of a contract  
9 that is received from a small business concern; and

10 (2) in the event that the contracting officer is  
11 unable to render a decision within the 30-day period,  
12 to transmit to the contractor within such period a  
13 written notification of a specific date by which the  
14 contracting officer expects to render a decision.

15 (b) *RULE OF CONSTRUCTION.*—Nothing in this section  
16 shall be considered as creating any rights under the Con-  
17 tract Disputes Act of 1978.

18 (c) *DEFINITION.*—In this section, the term “small busi-  
19 ness concern” means a business concern that meets the re-  
20 quirements of section 3(a) of the Small Business Act and  
21 the regulations promulgated pursuant to such section.

22 **SEC. 10. PROTECTIONS FOR SMALL BUSINESS.**

23 Section 15(b) of the Small Business Act (15 U.S.C.  
24 644(b)) is amended by striking “(b)” and inserting “(b)(1)”  
25 and by adding at the end the following:



1       “(2) No contracting procurement agency shall use any  
2 market acceptance criterion which would preclude small  
3 business concerns from being eligible for the contract award  
4 solely on the basis of being unable to supply a quantity  
5 of product when the same amount of product could be ob-  
6 tained from a number of small business suppliers.”.

7   **SEC. 11. DEADLINES FOR ISSUANCE OF REGULATIONS.**

8       (a) *PROPOSED REGULATIONS.*—Proposed amendments  
9 to the Federal Acquisition Regulation or proposed Small  
10 Business Administration regulations shall be published not  
11 later than 120 days after the date of the enactment of this  
12 Act for the purpose of obtaining public comment pursuant  
13 to either section 22 of the Office of Federal Procurement  
14 Policy Act or the Administrative Procedures Act, as appro-  
15 priate. The public shall be afforded not less than 60 days  
16 to submit comments.

17       (b) *FINAL REGULATIONS.*—Final regulations shall be  
18 published and become effective not later than 270 days after  
19 the date of the enactment of this Act.

20   **SEC. 12. ANNUAL REPORTS.**

21       (a) *CORRECTION OF DATA.*—The Administrator for  
22 Federal Procurement Policy, in consultation with the Ad-  
23 ministration, the Secretary of Commerce, the Secretary of  
24 Defense, and other appropriate agencies, shall supervise the

1 collection of data (either actual data or data acquired by  
2 valid statistical sample) on—

3 (1) the number of small business concerns owned  
4 and controlled by socially disadvantaged individuals  
5 or owned and controlled by women;

6 (2) the number of such small business concerns  
7 which compete for or otherwise apply for Federal con-  
8 tracts; and

9 (3) the number and dollar amounts of Federal  
10 contracts awarded to such small business concerns.

11 Such statistics shall be gathered on an annual basis and  
12 shall be done by industry category or classes of such cat-  
13 egories.

14 (b) *REPORTS*.—On the basis of the statistics required  
15 to be collected under subsection (a), and on the basis of other  
16 sources of relevant information, the President shall report  
17 annually to Congress on the progress that small business  
18 concerns described in subsection (a) are making in obtain-  
19 ing a fair and equitable share of Federal procurement dol-  
20 lars. The President shall also assess the extent to which the  
21 Federal procurement system, or parts thereof, continues to  
22 require affirmative actions, such as the goals set forth in  
23 section 15(g) of the Small Business Act (as amended by sec-  
24 tion 5 of this Act) in order to remedy past or presently

1 remaining discrimination against such small business con-  
2 cerns.

3 **SEC. 13. SMALL BUSINESS CONCERNS OWNED BY WOMEN.**

4 (a) *SUBCONTRACT PARTICIPATION*.—Section 8(d) of  
5 the Small Business Act (15 U.S.C 637(d)) is amended—

6 (1) by striking “and small business concerns  
7 owned and controlled by socially and economically  
8 disadvantaged individuals” both places it appears in  
9 paragraph (1), both places it appears in paragraph  
10 (3)(A), in paragraph (4)(D), in subparagraphs (A)  
11 and (F) of paragraph (6), and in paragraph (10)(B)  
12 and inserting “, small business concerns owned and  
13 controlled by socially disadvantaged individuals, and  
14 small business concerns owned and controlled by  
15 women”;

16 (2) by striking subparagraph (D) in paragraph  
17 (3) and inserting the following:

18 “(E) Contractors acting in good faith may relay  
19 on written representations by their subcontractors re-  
20 garding their status as either small business concern,  
21 a small business concern owned and controlled by so-  
22 cially disadvantaged individuals, or a small business  
23 concern owned and controlled by women.”;

24 (3) in paragraph (3), by inserting after subpara-  
25 graph (C) the following new subparagraph (D):

1           “(D) The term ‘small business concern owned  
2           and controlled by women’ shall mean a small business  
3           concern—

4                   “(i) which is at least 51 percent owned by  
5                   one or more women; or, in the case of any pub-  
6                   licly owned business, at least 51 percent of the  
7                   stock of which is owned by one or more women;  
8                   and

9                   “(ii) whose management and daily business  
10                  operations are controlled by one or more  
11                  women.”;

12               (4) in paragraph (4)(E), by inserting “and for  
13               small business concerns owned and controlled by  
14               women” after “as defined in paragraph (3) of this  
15               subsection”; and

16               (5) in paragraph (6)(C), by striking “and small  
17               business concerns owned and controlled by the socially  
18               and economically disadvantaged individuals” and in-  
19               serting “, small business concerns owned and con-  
20               trolled by socially disadvantaged individuals, and  
21               small business concerns owned and controlled by  
22               women”.

23           (b) MISREPRESENTATIONS OF STATUS.—(1) Sub-  
24           section (d)(1) of section 16 of such Act (15 U.S.C. 645) is  
25           amended by striking “or ‘small business concern owned and



1 *controlled by socially and economically disadvantaged indi-*  
2 *viduals'” and inserting the following: “, or a ‘small busi-*  
3 *ness concern owned and controlled by socially and economi-*  
4 *cally disadvantaged individuals’, or a ‘small business con-*  
5 *cern owned and controlled by socially disadvantaged indi-*  
6 *viduals’, or a ‘small business concern owned and controlled*  
7 *by women’”.*

8       (2) Subsection (e) of such section is amended by strik-  
9 ing “or ‘small business concern owned and controlled by  
10 socially and economically disadvantaged individuals’” and  
11 inserting “, or a ‘small business concern owned and con-  
12 trolled by socially and economically disadvantaged individ-  
13 uals’, or a ‘small business concern owned and controlled by  
14 socially disadvantaged individuals’, or a ‘small business  
15 concern owned and controlled by women’”.

16       (c) DEFINITION.—Section 3 of such Act (15 U.S.C.  
17 632) is amended by adding at the end the following:

18       “(n) For the purposes of this Act, a small business con-  
19 cern is a small business concern owned and controlled by  
20 women if—

21       “(1) at least 51 percent of small business concern  
22 is owned by 1 or more women or, in the case of pub-  
23 licly owned business, at least 51 percent of the stock  
24 of which is owned by 1 or more women; and

- 1           “(2) the management and daily business oper-  
2       ations of the business are controlled by 1 or more  
3       women.”.





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